(29,934)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 624

WESTERN & ATLANTIC RAILROAD, APPELLANT,

vs.

GEORGIA PUBLIC SERVICE COMMISSION, PAUL B. TRAMMELL, JAMES A. PERRY, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

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[fol. 1] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION

In Equity

WESTERN & ATLANTIC RAILROAD, Plaintiff,

vs.

THE GEORGIA PUBLIC SERVICE COMMISSION, WALTER R. MCDONALD, Paul B. Trammell, James A. Perry, John T. Boifeuillet, James D. Price, as Individuals and Also as Members Constituting the Georgia Public Service Commission; Albert Collier, Individually and as Secretary of the Georgia Public Service Commission; W. E. Watkins, Individually and as Special Attorney of the Georgia Public Service Commission, and George M. Napier, Individually and as Attorney-General of the State of Georgia, Defendants.

BILL OF COMPLAINT

To the Honorable the Judges of the United States District Court for the Northern District of Georgia, Sitting in Equity:

Plaintiff brings this its bill of complaint against the defendants above named and respectfully shows to the Court as follows:

[fol. 2] I. That the plaintiff, the Western & Atlantic Railroad, is a Georgia corporation.

That The Nashville, Chattanooga & St. Louis Railway is a Tennessee corporation, with its principal office at Nashville, Davidson County, Tennessee; that said The Nashville, Chattanooga & St. Louis Railway, conformably to the laws of the State of Georgia (Act of November 30, 1915, as amended by the Acts of August 4 and 19, 1916), leased from the State of Georgia the Western & Atlantic Railroad, extending from Atlanta to Chattanooga, for a period of fifty years, commencing December 27, 1919, said contract being dated May 11, 1917. By virtue of the provisions of Section 11 of said Act of November 30, 1915, commonly called the "Lease Act," and of said lease, The Nashville, Chattanooga & St. Louis Railway, as such lessee, became a Georgia corporation under the name and style of the Western & Atlantic Railroad.

II. The defendant Georgia Public Service Commission was created and empowered by various acts of the Legislature of said State, brought forward and codified in the 1910 Code of Georgia as Sections 2615 to 2670, inclusive (the Railroad Commission of Georgia became the Georgia Public Service Commission by virtue of the Act [fol. 3] of August 21, 1922); the domicile of said Commission as fixed by Section 2625 of said Code being in the city of Atlanta, Fulton County, in the Northern District of Georgia, Northern Division.

The defendants Walter R. McDonald, Paul B. Trammell, James A. Perry, John T. Boifeuillet and James D. Price, constituting the personnel of the Georgia Public Service Commission, having been duly elected and qualified according to law and are citizens, residents and inhabitants of the Northern District of the State of Georgia, except that John T. Boifeuillet and Walter R. McDonald are residents and inhabitants of the Southern District of the State of Georgia.

Defendant Albert Collier is the duly qualified Secretary of the Georgia Public Service Commission and a citizen, resident and inhabitant of the Northern District of the State of Georgia, Northern Division.

Defendant W. E. Watkins is the Special Attorney of the Georgia Public Service Commission, appointed under Section 2624 of said Georgia Code, and is a citizen, resident and inhabitant of the Southern District of the State of Georgia.

Defendant George M. Napier is Attorney-General of the State of Georgia, his duties being set forth in Sections 254 to 257, both inclusive, and Section 2648 of said Georgia Code, and is a citizen, resident and inhabitant of the Northern District of Georgia, Northern Division.

[fol. 4] III. This suit, together with the controversy upon which it is based, is of a civil nature and arises under the Fourteenth Amendment to the Constitution of the United States and under the laws of the United States—namely, the Interstate Commerce Act and the Elkins Act—and attacks the legality of an order of the Georgia Public Service Commission (dated August 31, 1923) directing the plaintiff to render switching service to the National Bonded Warehouse, Inc., of Atlanta, Georgia, upon terms and conditions that unduly and unreasonably prefer the National Bonded Warehouse, Inc., in violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act, over its competitors and all other shippers similarly circumstanced, so that said Warehouse Company, if said order is obeyed, would receive transportation service at less net cost than do all other shippers and industries, including its competitors, under similar circumstances and conditions; and which, if enforced, would deprive plaintiff of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

IV. (a) This suit arises under the laws of the United States—namely, the Interstate Commerce Act—and the matter in controversy [fol. 5] exceeds, exclusive of interest and costs, the sum or value of three thousand dollars. (Subsection 1 of Section 24 of the Judicial Code.)

(b) This suit arises under a law regulating commerce between the States. (Subsection 8 of Section 24 of the Judicial Code.)

(c) This suit arises under the Fourteenth Amendment to the Constitution of the United States.

V. Plaintiff Western & Atlantic Railroad is a Georgia corporation, operating a line of railroad doing both interstate and intrastate business between the city of Chattanooga, in Tennessee, and the city of Atlanta, in the State of Georgia, a distance of 137 miles, and forms an integral part of the system of The Nashville, Chattanooga & St. Louis Railway, which operates approximately 1,250 miles of main line track in the States of Tennessee, Kentucky, Alabama and Georgia.

VI. The National Bonded Warehouse, Inc., is a Georgia corporation, chartered on May 17, 1922, with its place of business along [fol. 6] the side of the right of way of the Western & Atlantic Railroad in the city of Atlanta, Georgia.

Said Warehouse Company is located alongside the Railroad's main line within the city of Atlanta in a newly constructed building, in front of which there lay an old private industrial siding, the portion in front of the Warehouse Company's property being in more or less dilapidated condition.

This industrial siding diverges from the northbound main line track 695.7 feet in a southerly direction. It was built many years ago for the convenience of industries then located thereon. At the present time J. K. Shippey and the National Bonded Warehouse, Inc., are the industries adjacent to said track. Due to physical limitations, they are the only two industries that are using or can use said siding. The public at large have not, do not and cannot use it. It was constructed and operated solely for the convenience of adjacent industries, at additional expense to the Railroad, thereby saving said industries drayage expenses.

Said track is in need of repairs, and the approximate 163 feet of track in front of the Warehouse Company's property will require an immediate expenditure of $449 to make it safe and serviceable. The annual maintenance cost of said portion (163 feet) of said siding will be $43, and the enforcement of said order of the Georgia Public Service Commission would require plaintiff to suffer a loss of about six dollars per car on all business handled to and from [fol. 7] said industrial track, the line movement of which cars is over railroads other than that of plaintiff, amounting approximately to seven hundred dollars per annum. Plaintiff's land upon which said track lies is worth over $1,000. A map showing the local situation, with said track in red, is hereto attached, marked Exhibit No. 1, but not for copy.

The Warehouse Company was anxious that this track be put in physical condition to permit safe switching thereon in its behalf and that such switching should commence at once.

The Railroad and its lessee, The Nashville, Chattanooga & St. Louis Railway, as will be hereinafter more fully shown, have a fixed, fair and reasonable standard form of contract which all shippers circumstanced as the National Bonded Warehouse, Inc., must sign before they can receive switching service on industrial sidings. There was some difference between the Railroad and the Bonded Warehouse Company as to some of the items of expense, and pend-

ing negotiations and with the understanding, so far as the Railroad was concerned, that the Bonded Warehouse Company would sign the standard form of contract, switching service was immediately commenced. Finally, after an undue prolongation of negotiations, it became apparent that the Warehouse Company would execute no contract of any sort. Thereupon the Railroad notified it under date of August 2, 1923, that unless the standard form of contract should [fol. 8] be executed by August 15, switching service would be discontinued, said letter being in words and figures as follows:

"Atlanta, Ga., August 2, 1923.

National Bonded Warehouse Company, 1000 Marietta Street, Atlanta, Georgia.

GENTLEMEN: Since April, 1922, we have had up with you the matter of executing our standard form of contract covering service to your plant at 1000 Marietta Street. At times we have been led to believe that you would execute a contract, but it now appears that it is not your intention to do so.

In order to accommodate you we have made deliveries of cars to your plant pending the completion of the negotiations. As it now appears that it is not your intention to execute the contract, we are of necessity forced to discontinue the service. You will therefore please accept this as notice that unless our standard form of contract is executed by the 15th of this month, we will make no further deliveries of cars to your plant, and all service to it will be discontinued.

Yours truly, (Signed) J. A. Baldwin, Superintendent."

On August 6, 1923, Chairman Trammell, of the Georgia Public Service Commission, wrote Mr. Baldwin in words and figures as follows:

[fol. 9] "Atlanta, August 6, 1923.

Please refer to file No. 15777.

Mr. J. A. Baldwin, Supt. Western & Atlantic Railroad, Atlanta, Georgia.

DEAR SIR: Please refer to your letter of August 2 addressed to the National Bonded Warehouse Company, Atlanta, notifying that company that unless they signed your standard form of contract covering sidetracks, you would discontinue serving them after August 15 next, etc.

The Commission hereby directs that you do not discontinue serving the National Bonded Warehouse Company on the sidetrack in question until the matter has received the consideration of this Commission. In the meantime the Commission will be glad to hear from you in the matter.

Yours very truly, (Signed) Paul B. Trammell, Chairman."

On August 9, Mr. W. P. Bruce, General Manager of the Railroad, wrote Chairman Trammell a letter in words and figures as follows:

"Nashville, Tenn., August 9, 1923.

Mr. Paul B. Trammell, Chairman Georgia Public Service Commission, Atlanta, Ga.

DEAR SIR: Your letter of August 6 to Mr. Baldwin, Superintendent of the Western & Atlantic Railroad, has been referred to me.

We regret very much that you undertake to give us a specific direction on a detail of operation without ever having heard our [fol. 10] side of the controversy. We will be prepared on twenty-four hours' notice to appear before your Commission. We hope very much, if you feel that the matter warrants an investigation, that you will have this hearing before the 15th of August.

We think you will appreciate the fact that we must be the judges of the details of the operation of our road. Industries are almost every day using every means possible to compel us to give them preferences to which they are not entitled under the law. Our policy in this respect is uniform throughout the system. It is the outgrowth of many years of labor, study, litigation and legislation.

Would greatly appreciate further advice from you regarding the matter.

Yours truly, (Signed) W. P. Bruce, General Manager."

On August 10, Chairman Trammell wrote Mr. Bruce in words and figures as follows:

"Atlanta, August 10, 1923.

Please refer to file 15777.

Mr. W. P. Bruce, General Manager N. C. & St. L. Railway, Nashville, Tennessee.

DEAR SIR: The Commission is this morning in receipt of your letter of the ninth instant, with reference to complaint of the National Bonded Warehouse Company on account of discontinuance by your Company of service to them on a sidetrack, which service they had been receiving for some time.

I regret that you do not appreciate the action of the Commission in directing that this service be restored, and your attention is called [fol. 11] to the Commission's General Order No. 14. The Commission knows of no reason why this sidetrack service should be discontinued, no application from your Company having been made to this Commission for such authority, which is necessary before the service can be discontinued.

Very truly yours, (Signed) Paul B. Trammell, Chairman."

On August 13, Mr. Bruce wrote Chairman Trammell in words and figures as follows:

"Nashville, Tenn., August 13, 1923.

Mr. Paul B. Trammell, Chairman, Georgia Public Service Commission, Atlanta, Georgia.

DEAR SIR: Referring to yours of the 10th in reply to mine of the 9th instant in regard to complaint of the National Bonded Warehouse Company on account of discontinuance by our Company of service to them on a sidetrack, which service they had been receiving for some time:

The National Bonded Warehouse Company began operation in this warehouse in the early part of 1922. We made it clear at that time that in order to have switching service they would have to execute our standard sidetrack contract. We understood that they would do this, and, pending actual execution, we temporarily gave them service. They now definitely refuse, after dragging negotiations out over a long period, to execute this contract. If we continue the service which we have been rendering, we will, according to the advice of our counsel, be giving them an undue preference [fol. 12] contrary to the provisions of the Interstate Commerce Act. There is nothing for us to do, therefore, but to suspend service on this track until they do that which every shipper on our line, under similiar circumstances and conditions, does.

We do not understand that this service comes within the provisions of your General Order No. 14.

Yours truly, (Signed) W. P. Bruce, General Manager."

On August 14, Chairman Trammell wrote Mr. Bruce in words and figures as follows:

"Atlanta, August 14, 1923.

Please refer to file 15777.

Mr. W. P. Bruce, General Manager N. C. & St. L. Ry., Nashville Tenn.

DEAR SIR: The Commission is today in receipt of your letter of the 13th inst., with reference to the complaint of the National Bonded Warehouse, in connection with sidetrack service in Atlanta, and has noted the same.

The Commission hereby directs that you do not discontinue service to the National Bonded Warehouse Company, or any other similar service, without first having secured the approval of this Commission.

Very truly yours, (Signed) Paul B. Trammell, Chairman."

On August 17, Chairman Trammell wrote Mr. Bruce in words and figures as follows:

[fol. 13] "Atlanta, August 17, 1923.

Mr. W. P. Bruce, General Manager N. C. & St. L. Ry., Nashville, Tenn.

DEAR SIR: Referring to your letter of August 15th, with reference to complaint of the National Bonded Warehouse Company, Atlanta:

The Commission is just in receipt of advice from the National Bonded Warehouse Company that your Company has discontinued their sidetrack service, and the Commission has just sent you the following telegram:

'You are hereby ordered to immediately restore sidetrack service to the National Bonded Warehouse Company, Atlanta, and ordered to show cause before the Commission on August 28 next why this order should not be made permanent.'

And now beg to confirm the same.

I also enclose copy of Rule Nisi issued by the Commission today, directing that your Company show cause before this Commission on August 28, next, why the order in the above-quoted telegram should not be made permanent.

Please acknowledge receipt.

Yours very truly, (Signed) Paul B. Trammell, Chairman."

On Tuesday, August 28, 1923, a hearing was held in this case, a full, complete and accurate stenographic report of which will be shown to the Court. With the permission of the Commission, a brief was filed on the morning of August 31. On the same day—August 31, 1923—at 2:30 P. M., the following order was made:

[fol. 14] "Atlanta, August 31, 1923.

File 15777

In re Discontinuance of Sidetrack Service to the NATIONAL BONDED WAREHOUSE COMPANY, Atlanta, Georgia, by Nashville, Chattanooga & St. Louis Railway

Upon consideration of the facts and the law in this case, it is

Ordered: That, effective immediately on receipt of this order, the N. C. & St. L. Railway restore sidetrack service to the National Bonded Warehouse Company, Atlanta, Georgia.

This August 31, 1923.

By order of the Georgia Public Service Commission:

(Signed) Paul B. Trammell, Chairman. (Signed) Albert Collier, Secretary."

It was agreed at the hearing that notices and orders to and against The Nashville, Chattanooga & St. Louis Railway should be considered equally applicable to the Western & Atlantic Railroad.

VII. The National Bonded Warehouse, Inc., is located two city blocks, being by public street, 1,600 feet from the Railroad's public team tracks in the city of Atlanta, said team tracks being adequate in size and proper in layout and construction to conveniently and properly handle all the public business, including that of the Warehouse [fol. 15] Company; and since the discontinuance of switching service to said Warehouse Company on August 15, conformably to the notice hereinbefore set out, the Railroad has been ready to serve that industry on said public team track.

A map showing the location of the Warehouse Company and the public team tracks and the surrounding transportation facilities and industries has already been filed as Exhibit No. 1.

Four pictures showing the location of the Warehouse Company and the layout of the industrial track in front of its property are hereto attached, marked Exhibit No. 2.

In the sixteen months during which the Warehouse Company has been located at the present site the total number of cars loaded and unloaded on this industrial siding by the Warehouse Company was 314, of which number approximately 85 per cent contained freight moving in interstate commerce. Of this number of cars, only 139 were handled by the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway, 85 per cent of which moved in interstate commerce, 175 of this number being handled by other railroad companies operating lines into and out of Atlanta.

For placing loaded cars that come into Atlanta on other railroads on this industrial siding, plaintiff receives a switching charge of $2.50 per car, said charge not covering the actual out-of-pocket cost [fol. 16] of service. For placing loaded cars that come into Atlanta on plaintiff's road no switching charge is made, although the cost of placing a car on said industrial siding is considerably more than the cost of placing the same car on the public team tracks.

No charges are made for moving empty cars off the siding.

VIII. The defendant Georgia Public Service Commission is by Section 2664 of the 1910 Code vested with the following powers:

"2664. Further Powers.—The railroad commission shall have authority to ascertain the cost of construction and the present value of properties in Georgia owned by said corporations or companies, and to that end may employ necessary experts. Said commission shall have authority to prescribe rules with reference to spur tracks and side tracks, with reference to their use and construction, removal, or change, with full power to compel service to be furnished to manufacturing plants, warehouses, and similar places of business along the line of railroads, where practicable and in the judgment of the commission the business is sufficient to justify, and on such terms and conditions as the commission may prescribe. It shall have power and authority to order and compel the operation of sufficient and proper passenger service when in its judgment inefficient or insufficient service is being rendered the public or any community. It shall have the power and authority, when in its judgment practicable and to the interest of the public, to order and compel the making and operation

[fol. 17] of physical connection between lines of railroad crossing or intersecting each other, or entering the same incorporated town or city in this State. It shall have authority to fix penalties for neglect on the part of railroad companies to adjust overcharges and losses, or failure to decline to do so, if deemed unjust, in a reasonable time. It shall have power and authority to prescribe rules and penalties covering and requiring the prompt receipt, carriage, and delivery of freight, the prompt furnishing of cars to shippers desiring to ship freight, and shall also be authorized to prescribe rules and penalties for the transfer of cars through yards of connecting roads. Said commission shall have power and authority to order the erection of depots and stations where it deems the same necessary, and to order the appointment and service thereat of depot or station agents. The commission shall also have the power and authority to regulate schedules and compel connections at junction points of competing lines."

Penalties for the voliation of any legal order of said Commission are provided for in Sections 2667, 2668 and 2669 of the 1910 Georgia Code, which are as follows:

"2667. Penalties; Proceedings to Recover.—Every common carrier, railroad, street-railroad, railroad corporation, street-railroad corporation, express, telephone, telegraph, dock, wharfage, and terminal company or corporation within the State, and other corporations, companies, or persons coming under the provisions of this section, and all officers, agents, and employees of the same, shall obey, observe, and comply with every order made by the commission under [fol. 18] authority of law. Any common carrier, railroad, street-railroad, railroad corporation, street-railroad corporation, express, telephone, telegraph, dock, wharfage, or terminal company or corporation, cotton-compress company within this State, and other corporations, companies, or persons coming under the provisions of this section, which shall violate any provision of this section or the acts heretofore passed, or which fails, omits, or neglects to obey, observe, and comply with any order, direction, or requirements of the commission heretofore or hereafter passed, shall forfeit to the State of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge. Every violation of the provisions of this section or any preceding act, or of any such order, direction, or requirement of the railroad commission shall be a separate and distinct offense, and, in case of continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense. An action for the recovery of such penalty may be brought in the county of the principal office of such corporation or company in this State, or in the county of the State where such violation has occurred and wrong shall be perpetrated, or in any county in this State through which said corporation or company operates, or where the violation consists of an excessive charge for the carriage of freight or passengers, or service rendered, in any county in which said charges are made, or through which it was intended

that such passengers or freight should have been carried or through which such corporation operates, and shall be brought in the name of the State of Georgia by direction of the Governor. Any procedure to enforce such penalty shall be triable at the first term of the court at [fol. 19] which it is brought and shall be given precedence over other business by the presiding judge, and the court shall not be adjourned until such proceeding is legally continued or disposed of. The decision in such case may be taken to the Supreme Court as now provided in cases of the grant or refusal of injunctions by judges of the superior courts."

"2668. Penalties for Aiding and Abetting in Violations of Rules. —Every officer, agent or employee of any such common carrier, corporation, or company who shall violate, or procures, aids, or abets any violation by any such common carrier or corporation or company, of any provision of this section, or which shall fail to obey, observe, or comply with any order of the commission or any provision of any order of the commission, or who procures, aids, or abets any such common carrier or corporation or company in its failure to obey, observe, and comply with any such order, direction, or provision, shall be guilty of a misdemeanor, and shall be subject to prosecution in any county in Georgia in which said common carrier or corporation or company or officer, agent, or employee violates the provisions of this section or any provision of any order of the commission, or in any county through which said corporation operates. Any officer, agent, or employee shall also be subject to indictment under the provisions of this section, in any county in which a subordinate agent or employee of the company violates the provisions of this section, by the approval or direction, or in consequence of the approval or direction of such officer, agent, or employee; and the agent or employee who locally in any county violates the rules or direction of said commission in pursuance of the [fol. 20] direction or authority of his superior officer or agent of said company may be called as a witness, and be compelled to testify, showing the authority by which he acted, and such testimony shall not be used against such subordinate employee or agent, nor shall he thereafter be subject to indictment for said offense."

"2669. Penalties Applicable to All Orders of the Commission.— The penalties prescribed by this section and the procedure to enforce the same are made applicable to any and all violations of the rules, orders, and regulations established by the commission."

The Western & Atlantic Railroad submitted to the National Bonded Warehouse, Inc., its standard form of industrial siding contract, with the blanks filled in to meet the particular conditions applicable to that particular industrial siding, a copy of the same as submitted being hereto attached, marked Exhibit No. 3, but not for copy.

There was corespondence and personal negotiations between various representatives of the Railroad and the Warehouse Company, as a result of which the management of the Railroad was under the

impression that the Warehouse Company would, when certain minor details of maintenance expense were agreed upon, execute said standard form of contract. As soon as it became apparent that the Warehouse Company would execute no contract at all, the notice of August 2, 1923, above set out in full, was served upon the Ware- [fol. 21] house Company, and conformably to said notice switching service ceased after the 15th day of August, 1923. The Railroad admits that these negotiations were permitted to be unduly delayed, but this was done by the local officials in the hope that the Warehouse Company would finally agree to be treated as all others are treated.

IX. The National Bonded Warehouse, Inc., does, so far as plaintiff is informed and believes, an ordinary warehouse business, storing for various people goods ordered on consignment, for resale and the like. The amount of its business has been set forth in detail supra. Neither the nature nor the extent of its business differentiates it from many other businesses in that vicinity and along the lines of the Western & Atlantic Railroad and the Nashville, Chattanooga & St. Louis Railway.

Located at a convenient distance are public team tracks fully adequate in every respect to handle the Warehouse Company's business. The plaintiff, the Western & Atlantic Railroad, and its lessee, The Nashville, Chattanooga & St. Louis Railway, have adopted a standard form of contract for the construction, maintenance and use of new and existing industrial sidings, copy of which has been filed as Exhibit No. 3. The paragraphs thereof numbered 3 to 19, in- [fol. 22] clusive, are applicable to practically every condition that has arisen or can arise in the operation of these carriers. Paragraphs 1 and 2 will vary according to whether the industry has located at a point whether there is an existing siding or where there is no siding at all.

The Nashville, Chattanooga & St. Louis Railway prior to the present lease of the Western & Atlantic Railroad, above referred to, had been in possession and control of the Western & Atlantic Railroad under another and separate contract for about a quarter of a century prior to December 27, 1919. At that time and for many years on these railroads industrial sidings were constructed, maintained and operated without any fixed or definite plan or policy. One concern was treated in one way, another concern in another way, the result of which was that some industries were able to obtain transportation at less net cost than others. This condition, as plaintiff is informed and believes, obtained generally throughout the country. As the amount of business developed in the cities, the expense of terminal operation increased to such an extent that the management of these railroads saw that it was necessary to make the industries pay a proper share of the cost of construction and maintenance of industrial sidings. Moving cars to and from industrial sidings increases the Railroad's expenses and decreases the industries' expenses. At the same time, as the State and Federal law reg- [fol. 23] ulating commerce developed, it became obvious that what-

ever policy was determined upon it must be coextensive with the lines owned and operated by the Railroad to the end that there would be no preferences or discriminations.

The Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway prior to 1917 had made great strides towards standardizing contracts for the construction, maintenance and use of industrial sidings. Federal control of railroads came on the last of 1917, and the Director General of Railroads promulgated his General Order No. 15 and supplements 1 and 2 thereto relating to industrial sidings, a copy of this order and the supplements thereto is hereto attached, marked Exhibit No. 4. After the termination of Federal control and after the conclusion of litigation before the Interstate Commerce Commission involving the standardization of certain provisions of industrial siding contracts, reported in 61 I. C. C. 120, the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway, following the Government's lead during the period of Federal operation, finally established a definite, fixed invariable policy as shown by the contract attached hereto as Exhibit No. 3. This was essential, first, because the increased cost of operating terminals made it necessary that industries enjoying these special services should bear a proportional part of the expense thereof; second, because from the administrative standpoint of the [fol. 24] Railroad a standard policy and contract were the only practicable method of operating the hundreds of sidings all over the system, it being impossible to continue to properly operate with separate and different provisions covering the construction, maintenance and operation of the constantly increasing number of such sidings; and, third, through the absolute necessity, as a matter of law, of treating all industries under substantially similar circumstances and conditions in precisely the same manner.

At the present time the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway treat all new shippers and industries in the four States of Georgia, Alabama, Kentucky and Tennessee alike. There is no discrimination and no preference. Under similar circumstances and conditions each industry is treated precisely alike, this being essential, plaintiff is informed and believes, in order to comply with Sections 2 and 3 of the Interstate Commerce Act, the Elkins Act, and the various State laws inhibiting preferences and discriminations.

A statement of the development of the Railroad's policy and the reasons therefor are set out in Exhibit No. 5 hereto attached, but not for copy.

The order of the Georgia Public Service Commission above quoted, if obeyed, would compel the Western & Atlantic Railroad to depart from its fixed, fair, reasonable standard policy—a policy, as plaintiff [fol. 25] is informed and believes, adopted by practically all the railroads in the United States—and discriminate against all other shippers, interstate and intrastate, in the States of Kentucky, Alabama, Tennessee and Georgia in favor of the National Bonded Warehouse, Inc., alone.

The refusal of the Warehouse Company to sign the standard form of contract places the entire burden of maintenance and operation upon the Railroad, subjects it to the loss from fire and accident which it is meet and proper that the Warehouse Company should assume.

If the Warehouse Company is entitled to switching service on an industrial siding without conforming to the Railroad's standard policy, then, to prevent discrimination, it must give transportation service to others similarly circumstanced upon the same conditions. This would mean that the Railroad would immediately assume the maintenance cost of industrial sidings, now properly borne by the industries, in the sum of many thousands of dollars a year and would become subject to the constant danger of enormous losses from fire, accident and otherwise now properly assumed by the industries under the provisions of said standard form of contract.

X. The Western & Atlantic Railroad therefore avers that said [fol. 26] order of the Georgia Public Service Commission violates Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act in that it compels the Railroad to unduly prefer the Warehouse Company over others similarly circumstanced, thereby unjustly and unreasonably discriminating against others similarly circumstanced, furnishing it transportation service at less net cost than its competitors and other industries.

Your plaintiff therefore avers that said order of the Georgia Public Service Commission is illegal, null and void, because obedience thereto necessitates a violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act. If the order be obeyed, plaintiff will violate the Interstate Commerce Act and the Elkins Act; if it be not obeyed, plaintiff becomes liable for enormous and excessive fines and penalties under the Georgia statutes.

XI. Plaintiff further states that there are now in existence upon its line of railroad and that of The Nashville, Chattanooga & St. Louis Railway approximately one hundred industries the nature and character of whose business from a transportation standpoint is substantially similar to that of the National Bonded Warehouse, Inc., which have located on their lines since Federal control of railroads; that the annual cost of maintenance as borne by these indus- [fol. 27] tries under the Railroads' standard form of sidetrack contract is approximately $10,000.00; that there is no more reason why all these industries should pay something of the maintenance cost of their industrial sidings than for the National Bonded Warehouse, Inc., to do so.

Plaintiff avers that if it furnishes an industrial siding for the National Bonded Warehouse, Inc., and maintains the same at its sole expense that a failure to do likewise for all other industries similarly circumstanced would constitute an illegal preference in favor of the Bonded Warehouse Company. If, on the other hand, plaintiff furnishes industrial siding service to all industries, including those locating on its lines both before and after Federal control,

upon the same terms and conditions which it would serve the National Bonded Warehouse, Inc., should it obey said order of the Georgia Public Service Commission, then there would be imposed upon it an annual expense of approximately $180,000.00.

It is not the general custom of railroads in this country, and particularly of the plaintiff and The Nashville, Chattanooga & St. Louis Railway, to make a switching charge for business moving over its line of road destined to the industry's track. It is essential that this special service (adequate public team tracks, conveniently located, being always available)—namely, switching cars to and from industrial sidings—bear its proportionate part of the ex- [fol. 28] pense of commerce. The plaintiff and The Nashville, Chattanooga & St. Louis Railway, as have railroads in general throughout the country, require the industries to pay all or a proper proportion of the maintenance expenses of the industrial siding rather than requiring them to pay switching charges. If, therefore, the order of the Georgia Public Service Commission be valid so that the plaintiff must treat all others similarly circumstanced as it is ordered to treat the National Bonded Warehouse, Inc., then plaintiff and The Nashville, Chattanooga & St. Louis Railway will be required to render a special service in connection with transportation without charge therefor, thereby imposing an undue burden upon interstate commerce and taking the Railroads' property without due process of law.

The plaintiff therefore avers that said order of the Georgia Public Service Commisison because of the facts above stated constitutes a direct, serious and immediate burden upon interstate commerce, and also deprives it of its property without due process of law and is therefore null and void.

XII. Plaintiff has no adequate remedy at law, and should it fail to maintain and operate at its sole expense without any contract whatsoever, said industrial siding, it would, in accordance with the [fol. 29] provisions of Section 2657 of the 1910 Georgia Code above quoted, be subject to the excessive fines and penalties of $5,000 for every day it disobeyed said order, and said Company and every officer and agent thereof, failing to comply with said order, would be guilty of a misdemeanor under Section 2668 of the 1910 Georgia Code; hence your plaintiff cannot wait to have said order enforced, because the penalties are so enormous as to make that course impossible; and defendants, or some of them, unless restrained by order of this Honorable Court (the statutes of Georgia providing neither an express nor an exclusive method whereby plaintiff may protect its interest and test the validity of said order), will institute proceedings either to compel a compliance with said order or to penalize your plaintiff, its officers and agents, for a violation thereof, or both.

Your plaintiff further avers that unless said order of the Georgia Public Service Commission be enjoined that it will either be subject to the excessive fines and penalties above prescribed or else obey said order which will subject it to the penalties provided for in Sections 8 and 10 of the Interstate Commerce Act and in the Elkins Act for the violation of Sections 2 and 3 of the Interstate Commerce Act.

Your plaintiff therefore avers that only by a suit of this nature and by the injunctive process of this Court can it be fully protected in the exercise and determination of its rights and avoid sustaining irreparable loss and injury.

[fol. 30] XIII. Forasmuch, therefore, as your plaintiff is without remedy save by a court of equity and to the end that said Georgia Public Service Commission and Walter R. McDonald, Paul B. Trammell, James A. Perry, John T. Boifeuillet and James D. Price, individually and as members of said Commission, and Albert Collier, individually and as Secretary of said Commission, and W. E. Watkins, individually and as Special Attorney of said Commission, and George M. Napier, individually and as Attorney-General of the State of Georgia, all being residents, citizens and inhabitants of the Northern District of Georgia, save John T. Boifeuillet, Walter R. McDonald, and W. E. Watkins, who are citizens, residents and inhabitants of the Southern District of Georgia, shall be required to make full, complete and direct answer hereto, but not under oath, answer under oath being waived hereby; plaintiff prays that the defendants and each of them and all of their attorneys, servants, agents, associates and employees may be enjoined and restrained preliminarily until final hearing and perpetually thereafter from in any manner instituting or authorizing or directing to be instituted, any prosecution or proceeding or suit or action incident to, arising from or growing out of your plaintiff's failure to obey said order of the Georgia Public Service Commission; and that Albert Collier, Secretary of the Georgia Public Service Commission, may also be [fol. 31] enjoined from issuing any certificates or preparing any copies of the proceedings and orders of the Georgia Public Service Commission relative to the use of the industrial track in question, which certificates or copies might or could be used in undertaking either to enforce compliance with said order or exacting fines and penalties provided by statute for the violation thereof; that W. E. Watkins, Special Attorney of the Georgia Public Service Commission, and George M. Napier, Attorney-General of the State of Georgia, may be so enjoined and restrained from directing, authorizing or assisting in the institution of any proceeding either to force your plaintiff to comply with said order of the Georgia Public Service Commission or to exact penalties for the violation thereof.

And your plaintiff further prays that said order of the Georgia Public Service Commission be adjudged to be illegal, null and void as hereinbefore claimed, and to be held for naught, and that your plaintiff, its officers, agents and employees be not required to comply with said order.

Furthermore, plaintiff prays that a temporary restraining order, as provided by law, may issue restraining said defendants and each of them, their associates, attorneys, agents and employees in accordance with the prayer for a preliminary and perpetual injunction.

That said temporary restraining order may be served immedi-[fol. 32] ately upon each of said defendants and that plaintiff may

have such other, additional and further relief as equity may require.

Plaintiff states that it is willing, pending the final determination of the matters herein, to make bond or take such other and further action as to the Court may seem proper herein.

This is the first application for a writ of injunction or temporary restraining order in this cause.

May it please Your Honor to grant unto this plaintiff not only a writ of injunction and temporary restraining order conformably to the prayer, but also a writ of subpœna of the United States of America directed to said defendants, to wit: Georgia Public Service Commission, Walter R. McDonald, Paul B. Trammell, James A. Perry, John T. Boifeuillet and aJmes D. Price, as individuals and also as members constituting the Georgia Public Service Commission; Albert Collier, individually and as Secretary of the Georgia Public Service Commission; W. E. Watkins, individually and as Special Attorney of the Georgia Public Service Commission; and George M. Napier, individually and as Attorney-General of the State of Georgia, commanding them on a day certain to appear and answer this bill of complaint, but not under oath, and to abide by and perform such order or orders and decree or decrees as to the Court shall seem proper and required by the principles of equity and good conscience.

[fol. 33] And your plaintiff further prays that a duplicate writ of subpœna may be issued for the defendants Walter R. McDonald, John T. Boifeuillet and W. E. Watkins, residing in the Southern District of Georgia, directed to the Marshal of said Southern District of Georgia commanding the said McDonald, the said Boifeuillet and the said Watkins on a day certain to appear and answer this bill of complaint, but not under oath, and to abide by and perform such order or orders, decree or decrees in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

Western & Atlantic Railroad, By W. P. Bruce, General Manager. Tye, Peeples & Tye, Fitzgerald Hall, Solicitors for Plaintiff. Attest: T. A. Clarkson, Secretary. (Seal.)

[fol. 34] Jurat showing the foregoing was duly sworn to by W. P. Bruce, omitted in printing.

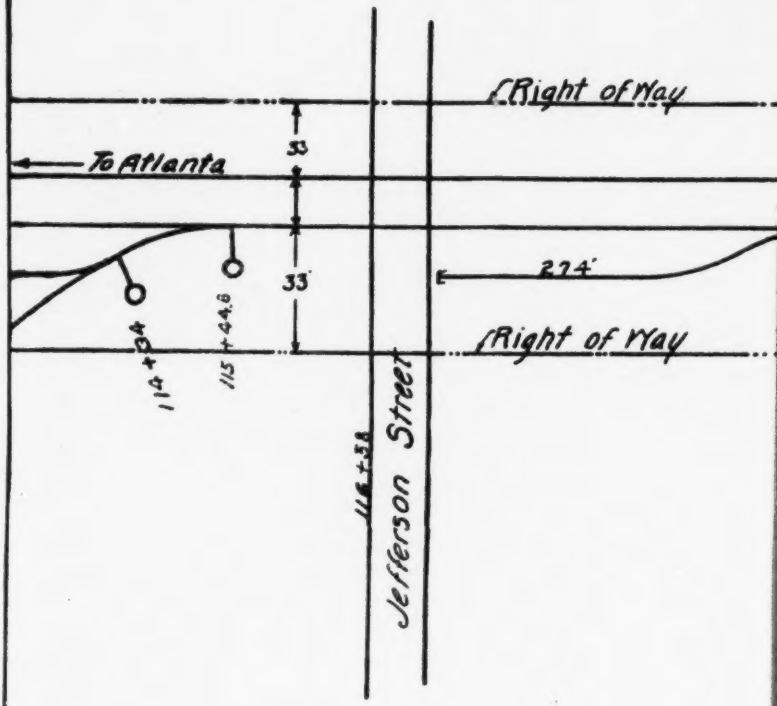
(Here follows Exhibit No. 1 to Bill of Complaint, marked side folio page 35)

[fol. 36] EXHIBIT NO. 2 TO BILL OF COMPLAINT

STATE OF TENNESSEE,
County of Davidson:

I, H. C. Hill, being duly sworn, state as follows:

I am an employee of The Nashville, Chattanooga & St. Louis Railway. I took the attached four pictures, Nos. 1 to 4, inclusive, on May 31st, 1923. These correctly portray the tracks serving the



Map Showing Track S
J.K. Shippey and Nationa
Warehouse Company, M
To Location of Public

Office of Division Engineer
Atlanta Ga August 25th 1923

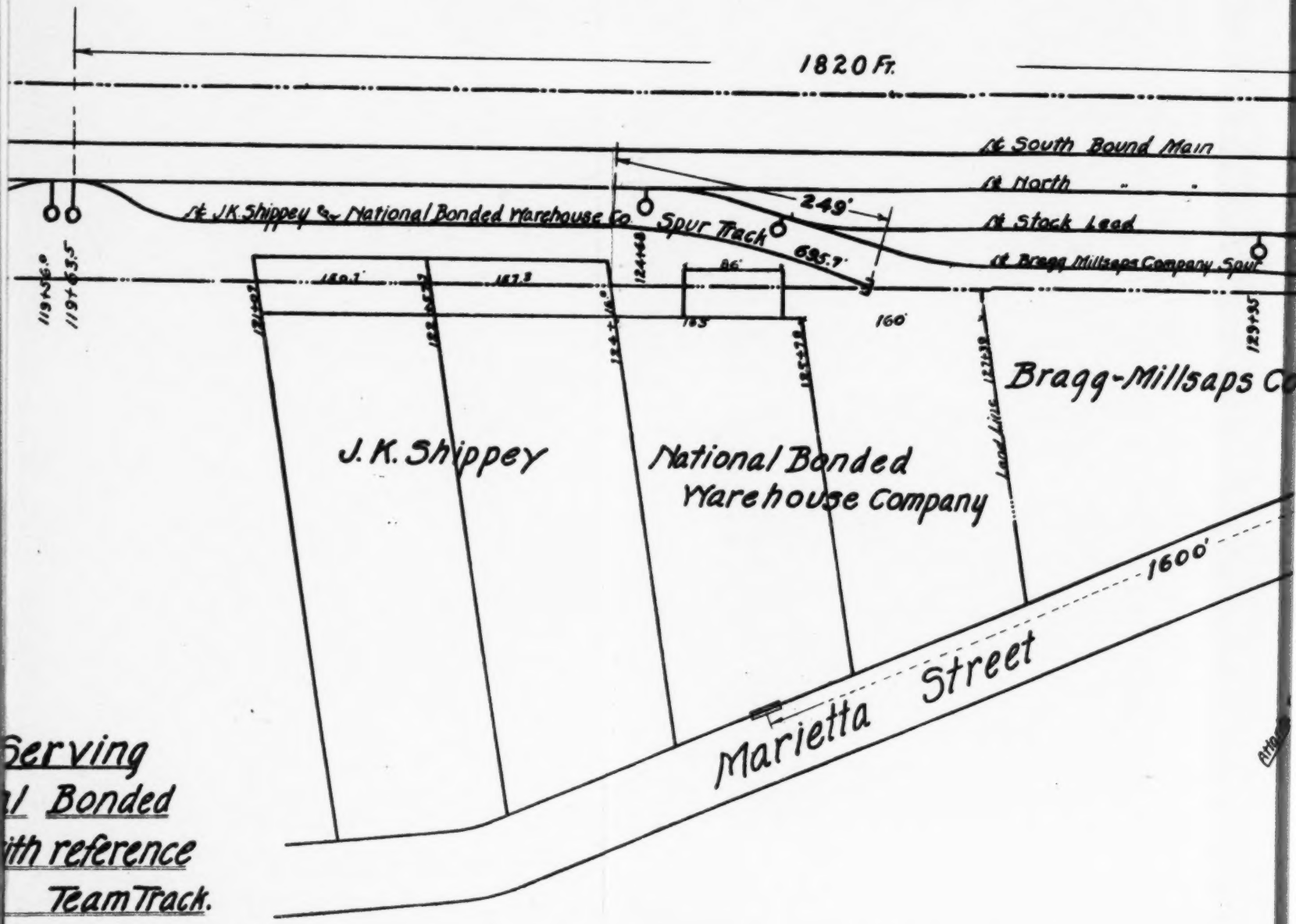
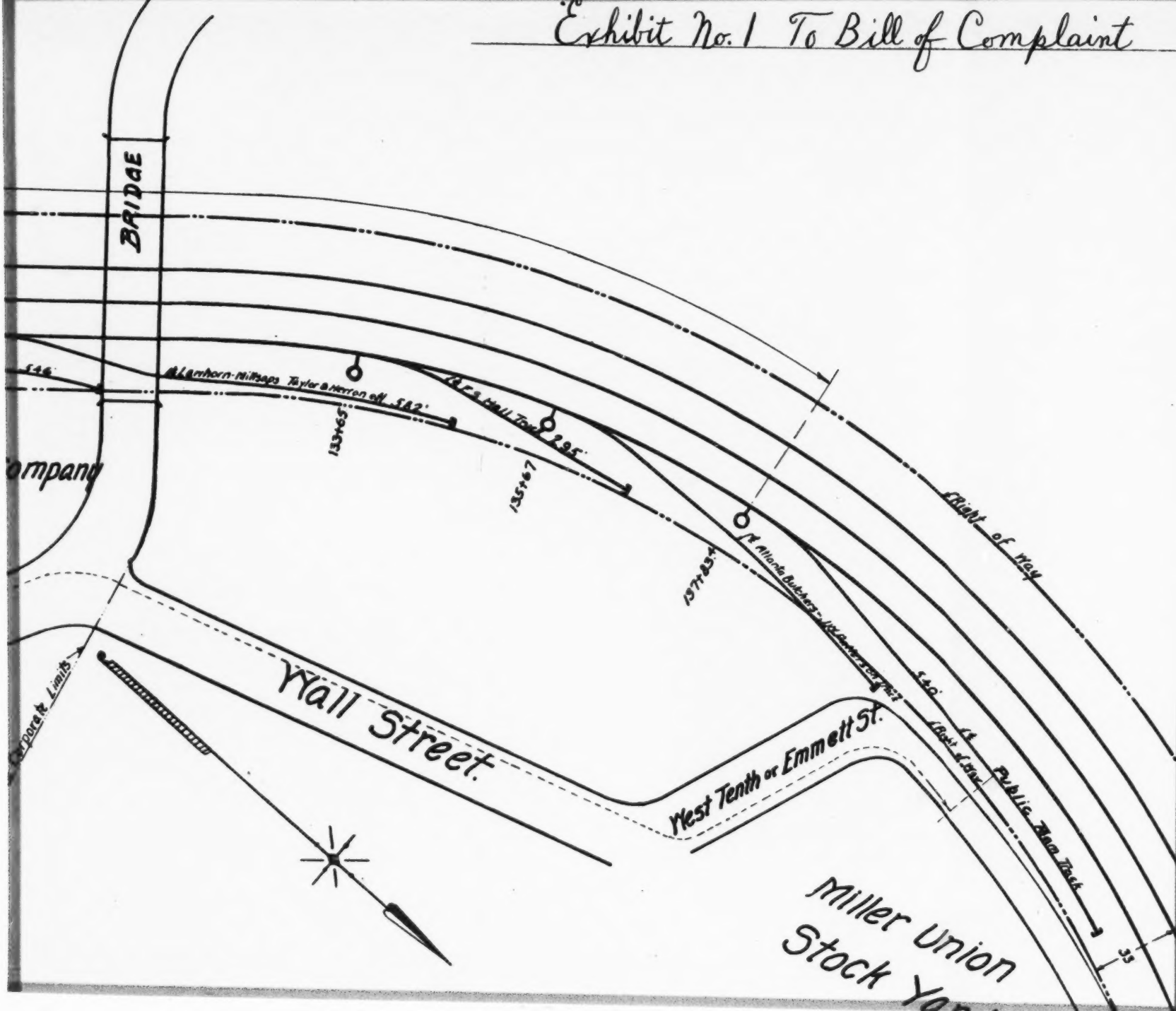
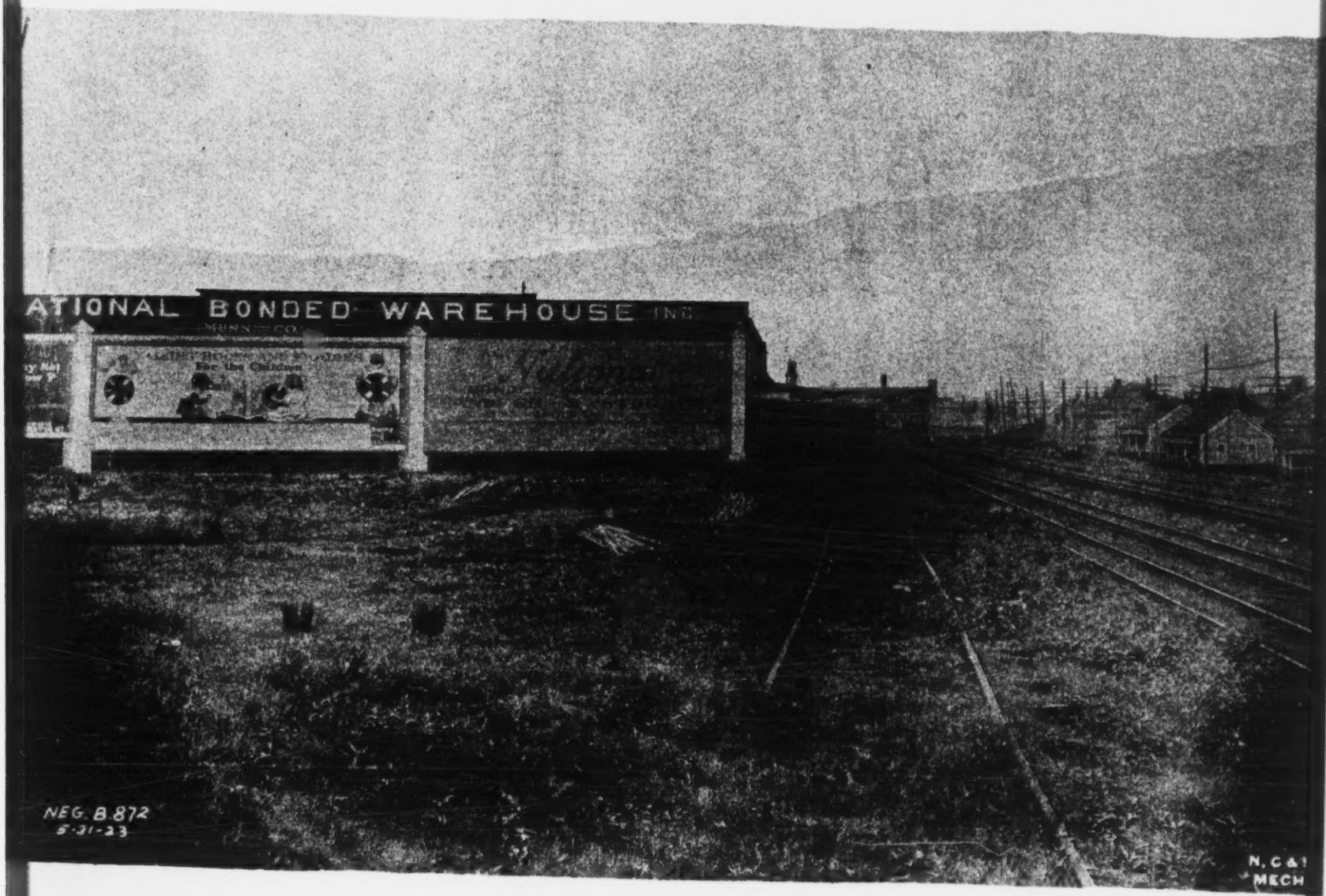
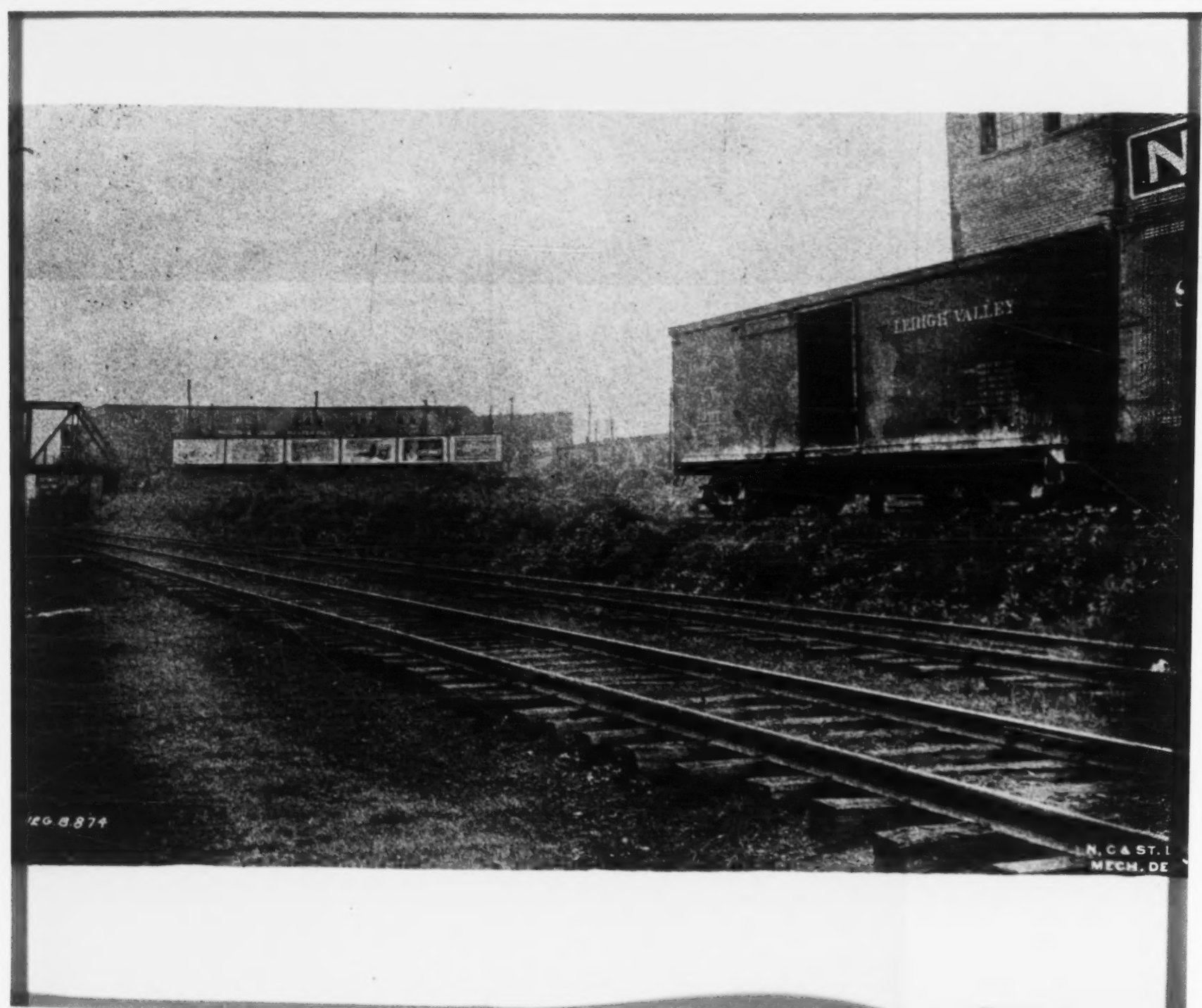
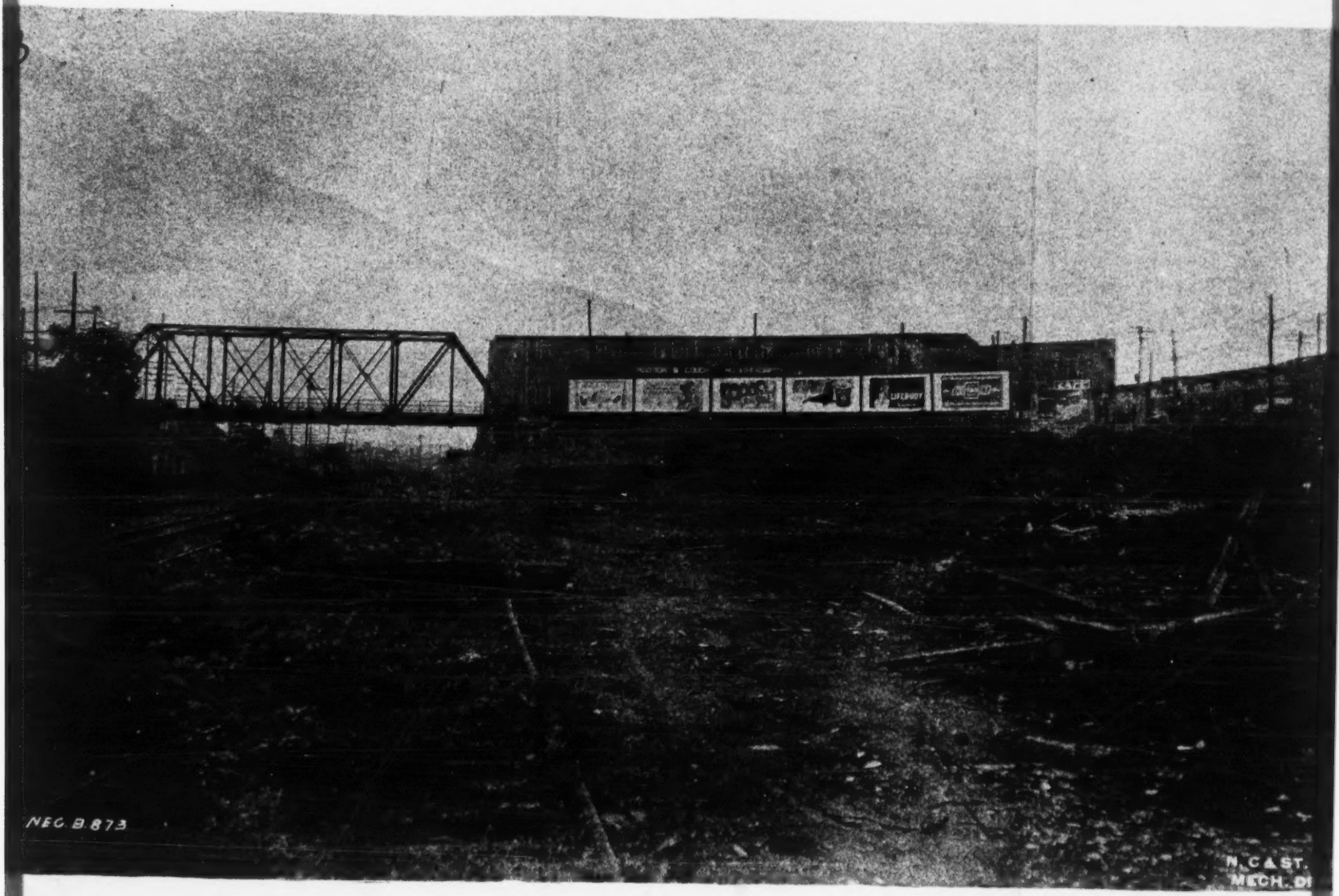

1820 Ft.
℄ South Bound Main
℄ North " "
℄ Stock Lead
℄ Bragg Millsaps Company Spur
℄ J.K. Shippey & National Bonded Warehouse Co. Spur Track
249'
695.7'
86'
160'
165'
180.1'
187.3'
119+56.0
119+63.5
124+48
Land Line
Bragg-Millsaps Co
J. K. Shippey
National Bonded
Warehouse Company
1600'
Marietta Street
Serving
al Bonded
ith reference
Team Track.

Exhibit No. 1 To Bill of Complaint

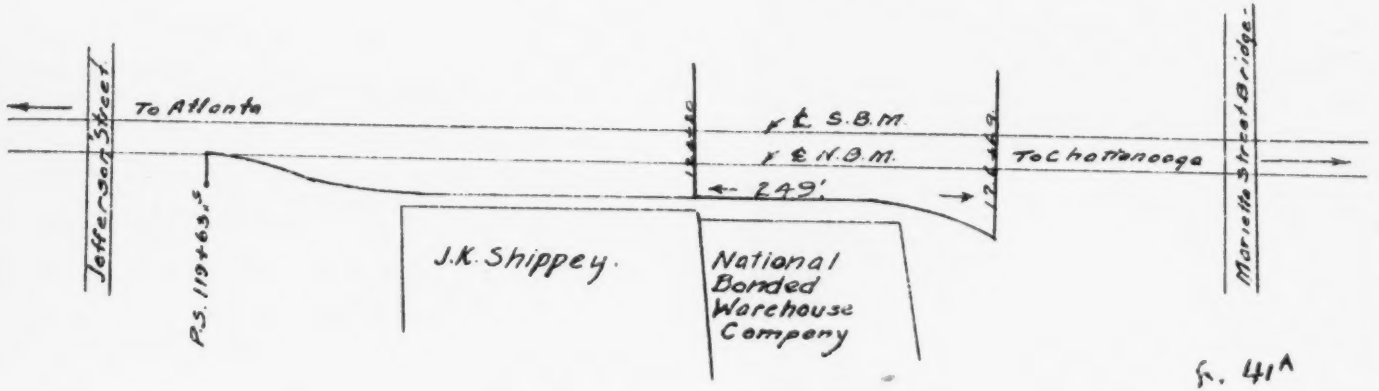



ATIONAL BONDED WAREHOUSE INC.
MUNN & CO.
For the Children
NEG. B.872
5-31-23
N. C. & St. L.
MECH


LEHIGH VALLEY
N, C & ST. L
MECH. DE


LIFEBUOY
NEG. B-873
N. C. & ST.
MECH. DI

NRG 8-875
N. C & ST
MECH. D


Jefferson Street
To Atlanta
℄ S.B.M.
℄ N.B.M.
To Chattanooga
249'
Marietta Street Bridge
P.S. 119+63.5
J.K. Shippey.
National Bonded Warehouse Company

Fr. 41A

National Bonded Warehouse Company at 1000 Marietta Street, Atlanta, Ga.

I make this affidavit for use of the Western & Atlantic Railroad in the case of the Western & Atlantic Railroad v. the Georgia Public Service Commission, growing out of the controversy relative to serving said Bonded Warehouse Company without execution by it of the Railway's standard form of contract.

H. C. Hill.

Sworn to and subscribed before me, this 14th day of August, 1923. R. T. Saunders, Notary Public. (Seal.)

(Here follow four photographs marked side folio pages 37, 38, 39, and 40)

[fol. 41] EXHIBIT NO. 3 TO BILL OF COMPLAINT

This contract made and entered into this the — day of ——, 192–, by and between The Nashville, Chattanooga & St. Louis Railway, lessee of the Western & Atlantic Railroad, and the Western & Atlantic Railroad, parties of the first part, hereinafter for convenience called the Railway, and National Bonaded Warehouse Co., of the County of Fulton, State of Georgia second party, hereinafter for convenience called the Industry.

Witnesseth: That

Whereas, the Railway owns a spur track 705.5 feet in length located at or near Jefferson St., in the County of Fulton, State of Georgia, diverging from the N. B. M. track of the Atlanta Division of the Railway on the east side thereof, as set out on the map below:

(Here follows reproduction of map marked p. 41A.)

And whereas, the Industry is desirous that it be served by the Railway by means of the said track, and

Whereas, the Railway is willing to serve the Industry under the terms and agreement hereinafter stated.

Now, therefore, in consideration of the mutual covenants and agreements hereinafter set out, it is agreed between the parties hereto as follows:

1. The said track from Val. Sta. 124 + 20 to Val. Sta. 126 + 29 shall be maintained and kept in good condition by the Railway and at the expense of the Industry. The Industry agrees that if at any time the Railway shall deem it necessary to make any repairs to or renewals of said track, or if because of the change in the standard of rail in said Railway's tracks, or for any other reason said Railway

shall deem it necessary to substitute heavier rails, frogs and switches [fol. 42] for the ones originally used, the said Industry agrees to pay to the Railway promptly in due course of business the actual cost of material used and labor expended for such repairs, renewals, or replacements according to the accounts kept of same by the said Railway.

2. It is agreed that the entire cost of all repairs to or renewals of switch ties shall be paid for by the Industry as a part of the cost of maintenance of said track.

3. The said Railway hereby reserves the right, and is fully authorized whenever and at any time it shall deem it necessary, for any reason whatever, and without let or hindrance from the said Industry, to take up and remove all track material from said track.

4. The Industry agrees that, without the written consent of the Railway, it will not direct or permit the use of said track by or for the benefit of any other party not one of the parties hereto, nor assign this contract.

5. And the said Industry for itself, successors and assigns hereby further covenants and agrees with the Railway that it will indemnify and hold said Railway harmless against the claims of property owners who may claim damages for, or on account of the construction *of* operation of said track and liabilities arising from such claims. And said Industry also agrees to place no overhead structure lower than twenty-two (22) feet above the top of rail of said track and to place no structure closer than eight (8) feet to the center of the track, and to keep the track free from obstructions and agrees to indemnify against liability and hold the Railway harmless from the claims and demands of any and all persons on account of any damages or injuries caused directly or indirectly by the existence, location or condition of any structures or obstructions of any kind on the premises of the Industry, or by any obstructions on said track.

6. The Industry agrees to exercise the greatest care in the management of the track herein provided for, to prevent cars or other obstructions from getting out upon or too close to the main or other tracks, and to use such means and care generally as will tend to avoid accidents of any kind.

[fol. 43] 7. It is understood, that the movement of railroad locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad Company (Railway) against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad (Railway) negligence, arising from fire caused by locomotives operated by the Railroad (Railway) on said tracks, or in the vicinity for the purpose of serving said Industry, except to the premises of the Railroad (Railway) and to rolling stock belonging to the Railroad (Railway) or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the

Railroad Company (Railway) for loss, damage liability or injury from any act or omission of the Industry, its employees or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation, while on or about said track; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally.

8. The Railway shall have the right to use the track when not to the detriment of the Industry.

9. That for any default of the Industry in any of its agreements expressed in this contract, or for any failure to perform any of its undertakings as set forth, the Railway may terminate this contract by giving the said Industry thirty days' notice in writing of its intention so to do.

10. The failure of the Railway to exercise its right to terminate this agreement for proper cause, as above provided, in any one instance, shall not be construed as a forfeiture of its right to do so should proper cause subsequently arise, the right being a continuing one.

11. That either party shall have the right to terminate this contract at any time by giving sixty days' notice in writing to the other party of its intention so to do.

[fol. 44] In witness whereof, the parties hereto have caused these presents to be executed by their duly authorized officers, the day and year above written.

The Nashville, Chattanooga & St. Louis Railway, Lessee of the Western & Atlantic Railroad, By —— ——, General Manager; Witness: —— ——; Western and Atlantic Railroad, By —— ——, General Manager, Parties of the First Part. Witness: —— ——. —— ——, By —— ——, Second Party. Witness: —— ——.

[fol. 45] EXHIBIT No. 4 TO BILL OF COMPLAINT

General Order No. 15

Washington, March 26, 1918.

The following requirements must be observed in respect of the construction, maintenance and operation of new industry tracks, and in respect of the operation and maintenance of existing industry tracks:

1. As to new industry tracks:

(a) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company.

(b) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch point to the clearance point.

(c) Generally speaking, an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right of way line.

(d) If the industry fails to maintain in reasonably safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition.

(e) The railroad company shall have the right to use the track when not to the detriment of the industry.

(f) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered; but where any such contracts appear to work inequalities or injustice the circumstances should be brought to the attention of the regional director, who will report thereon to the Director General, if conditions seem to warrant.

[fol. 46] 4. The requirements of State statutes and of State commissions in respect of the construction, maintenance, and operation of industry tracks shall be complied with, but in cases where such compliance involves what appears to be an unreasonable burden upon the United States Railroad Administration the circumstances should be brought to the attention of the regional director, who will report thereon to the Director General, if the conditions seem to warrant.

W. G. McAdoo, Director General of Railroads.

Supplement No. 1 to General Order No. 15

Washington, December 5, 1918.

General Order No. 15, dated March 26th, 1918, is hereby supplemented as follows:

1. General Order No. 15 is not to be construed as requiring or authorizing a Federal Manager to enter into a contract on behalf of the Director General to pay for that part of an industry track on the right of way from the switch point to the clearance point where, in the judgment of the Federal Manager, the amount of traffic to be derived by the United States Railroad Administration from the construction of the industry track is not sufficient to jus-

tify such expenditure. In cases where, in the judgment of the Federal Manager, the circumstances justify the construction of an industry track, but the amount of revenue to be derived therefrom by the United States Railroad Administration does not justify the payment by the Director General of the cost of that part of the track on the right of way from the switch point to the clearance point, an agreement may be made, otherwise in accordance with General Order No. 15, but providing for the payment of the entire cost of the track by the shipper with a provisions for refund up to, but not exceeding, the cost of the part of the track from the switch point to the clearance point, at the rate of two dollars ($2.00) per car of carload freight yielding road haul revenue, delivered on or shipped from the track during Federal Control.

2. Track material contained in that portion of an industry track on the railroad right of way which was installed and paid for by the industry during Federal control shall remain the property of [fol. 47] the industry, except to the extent that refund of the cost thereof shall have been made by the railroad or the Director General, but such ownership shall be subject to the right of the railroad to use the track when not to the detriment of the industry.

3. Upon the discontinuance of use of an industry track for the purposes of the industry, the industry shall have the right to have the track material on the right of way which was paid for by the industry during Federal control taken up and delivered to the industry, except to the extent that the cost of such track material shall have been refunded to the industry by the railroad or the Director General. The work of taking up the track shall be done, if the Federal Manager shall so desire, by the forces of the Federal Manager, but in any event at the expense of the industry.

W. G. McAdoo, Director General of Railroads.

Supplement No. 2 to General Order No. 15

Washington, August 9, 1919.

General Order No. 15, dated March 26, 1918, is hereby supplemented as follows:

Paragraph 2 of General Order No. 15 is hereby changed to read as follows:

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof. In the absence of a written contract as to the maintenance of an industry track constructed prior to March 26, 1918, the practice of the connecting carrier prior to Federal control, as applied to such track of any particular industry from the beginning of its use by such industry, shall be considered as equivalent to a written contract in accordance with such practice.

Walker D. Hines, Director General of Railroads.

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—Filed Sept. 5, 1923

Read and Considered. Let the foregoing bill of complaint be filed and subpœnas issue as prayed.

All the defendants are ordered to show cause before me and such other Judges as may be called to my assistance at Atlanta, Georgia on the 12 day of September, 1923, why injunction pendente lite should not issue as prayed preventing the defendants or any of them, from instituting any proceeding for the purpose of enforcing, or from endeavoring to enforce, the order of the Georgia Public Service Commission of August 31, 1923.

This September 4, 1923.

Sam'l H. Sibley, U. S. Judge.

[File endorsement omitted.]

Acknowledgment of Service

Due and legal service within petition and order acknowledged. Subpœna and further service waived.

Copy received. This Sept. 5th 1923.

W. E. Watkins, Solicitor for the Defendants.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

NOTICE TO THE GOVERNOR OF GEORGIA FOR APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed Sept. 13, 1923

To the Honorable Clifford Walker, Governor of the State of Georgia:

Conformably with the requirements of Section 266 of the Judicial Code, being the Judiciary Act of the Congress of the United States, approved March 3rd, A. D. 1911, and as amended by subsequent Acts of Congress, notice is hereby given that application has been made by the Western & Atlantic Railroad, the Complainant in the above case, for an interlocutory injunction to restrain the enforcement of the order of the Georgia Public Service Commission of August 31st, 1923, (A copy of which order is hereto attached) upon the ground that said order is unconstitutional, and that a hearing upon said application has been set by the Honorable Samuel H. Sibley, Judge of the United States Court for the Northern District of Georgia, before himself and such other Judges as he may call to his assistance, at Atlanta, Georgia on the 12th day of September, 1923, at 10 o'clock A. M.

Fitzgerald Hall, Tye, Peeples & Tye, Solicitors for the Western & Atlantic Railroad, Complainant.

Due service of the above and foregoing notice acknowledged. This September 5th 1923.

Clifford Walker, Governor of the State of Georgia, By Myrtle White, Executive Secretary. (Seal.)

[File endorsement omitted.]

[fol. 50] ORDER OF THE GEORGIA PUBLIC SERVICE COMMISSION

Atlanta, August 31st, 1923.

File 15777

In re. Discontinuance of Side Track Service to the NATIONAL BONDED WAREHOUSE COMPANY, Atlanta, Georgia, by Nashville, Chattanooga & St. Louis Railway

Upon consideration of the facts and law in this case, it is

Ordered: That effective immediately on receipt of this order, the N. C. & St. L. Railway restore side track service to the National Bonded Warehouse Company, Atlanta, Georgia.

This August 31st, 1923.

By order of the Georgia Public Service Commission:

(S.) Paul B. Trammell, Chairman. (S.) Albert Collier, Secretary.

[fol. 51] IN UNITED STATES DISTRICT COURT

NOTICE TO THE ATTORNEY GENERAL OF THE STATE OF GEORGIA FOR APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed Sept. 13, 1923

To the Honorable George M. Napier, Attorney General of the State of Georgia:

Conformably with the requirements of Section 266 of the Judicial Code, being the Judiciary Act of the Congress of the United States, approved March 3rd, A. D. 1911, and as amended by subsequent Acts of Congress, notice is hereby given that application has been made by the Western & Atlantic Railroad, the Complainant in the above case, for an interlocutory injunction to restrain the enforcement of the order of the Georgia Public Service Commission of August 31st, 1923, (a copy of which order is hereto attached) upon the ground that said order is unconstitutional, and that a hearing upon said application has been set by the Honorable Samuel H. Sibley, Judge of the United States Court for the Northern District of Georgia, before himself and such other Judges as he may call to

his assistance, at Atlanta, Georgia on the 12th day of September, 1923, at 10 o'clock A .M.

Fitzgerald Hall, Tye, Peeples & Tye, Solicitors for the Western & Atlantic Railroad, Complainant.

Due service of the above and foregoing notice acknowledged. This September 5th 1923.

T. R. Gress, Asst. Attorney General of the State of Georgia.

[File endorsement omitted.]

[fol. 52] Copy of order of Public Service Commission omitted; printed side page 50, ante.

[fol. 53] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed Sept 12, 1923

Now comes the Georgia Public Service Commission;—Paul B. Trammell, James A. Perry, John T. Boifeullet, J. D. Price, Walter R. McDonald, as individuals, and also as members constituting the Georgia Public Service Commission; Albert Collier, individually and as Secretary of the Georgia Public Service Commission; W. E. Watkins, individually and as Special Attorney of the Georgia Public Service Commission, and Geo. N. Napier, individually and as Attorney General of the State of Georgia;—and jointly and severally move to dismiss the bill of complaint in said case on the following grounds, to-wit:—

1. Because no cause of action is set out therein.

2. Because complainant is not entitled to any equitable relief, and especially to the extraordinary remedy of injunction under the facts stated in its bill of complaint.

3. Because the matters in dispute between complainant and these respondents alleged in said bill of complaint, relate to rights and injuries affecting shippers, a grievance about which complainant has no concern.

4. Because the matters alleged in complainant's bill relate to rebates and discriminations between shippers and the Interstate Commerce Commission having original and primary jurisdiction thereof, the Court is without jurisdiction until the Interstate Commerce Commission has acted.

Whereof respondents pray that the bill be dismissed and that they have judgment for costs.

W. E. Watkins, Solicitor for Respondents.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

ANSWER—Filed Sept. 12, 1923

Now comes the Georgia Public Service Commission, Walter R. McDonald, Paul B. Trammell, James A. Perry, John T. Boifeuillet, J. D. Price, as individuals, and also as members, constituting the Georgia Public Service Commission, Albert Collier, individually, and as Secretary of the Georgia Public Service Commission, W. E. Watkins, individually, and as Special Attorney of the Georgia Public Service Commission, and George N. Napier, individually, and as Attorney General of the State of Georgia, respondents in the above stated case, and in answer to the bill of complaint in said case, say:

1. These respondents admit the allegations of paragraphs 1, 2, and 5 of said bill of complaint.

2. These respondents deny the allegations of paragraphs 3 and 4 of said bill of complaint.

3. These respondents admit the allegations of paragraph 6 of bill of complaint, except as herein denied:

Respondents deny that the National Bonded Warehouse Company's building is newly constructed, but on the contrary, say it has been located on the said side track for many years, and has been served continuously by the railroad on said siding for many years prior to the first day of March, 1920, and since then continuously without interruption, until the 15th day of August, 1923.

While it is admitted that the National Bonded Warehouse Company was incorporated on May 17th, 1922, prior to its incorporation, the building was there, the siding was where it is now, and service was rendered the building by complainant on the side track without interruption for many years prior to its incorporation, and that while there is a change of name, there has been no change in the building, except to enlarge it, which enables more freight to be handled and consequently of greater benefit to complainant in in-

[fol. 55] creased volume of business and revenue.

Respondents further say that the side track was built for the purpose of serving a brick yard beyond the building of the National Bonded Warehouse, and at the time the building was erected, the side track was already there, where it is today; that in all probability the reason why the building was erected was due to the fact of the existence of the side track, and the ability to get side track service, and that the side track induced the building to be erected, and the business to be established, rather than the side track being constructed for the benefit of the building, or the business carried on therein.

It is denied that due to physical limitations they are the only two industries that can use said siding, and that the public at large has not and cannot use it. Respondents say this track is on the

right-of way of railroad, and consequently a public, and in no sense of private, track.

It is denied that an expenditure of $449.00 is required to make said side track safe and serviceable. Respondents answer that on the hearing before them on the 28th day of August, 1923, it developed that the amount stipulated as necessary to be spent was contingent on changing the grade of the track to better meet the requirements of the National Bonded Warehouse, and these changes were requested by the Warehouse Company, and not demanded by the railroad, and therefore, in the event these changes were not made, this amount of money would not of necessity have to be spent immediately, and when questions were being propounded to witnesses by the Commission for the purpose of developing this feature of the physical condition of the siding as it is at present, Mr. Hall, as General Counsel for the railroad, broke into the examination with the following statement, to wit: "We admit the only reason we have ceased to serve it is because they have declined to execute our uniform contract" and further admitted that no demand has ever been upon the National Bonded Warehouse to pay for repairs or have any repairs made. These admissions appear on page thirty-eight of official reporter's report of the hearing before the Commission, August 28th, 1923.

[fol. 56] Respondents respectfully submit that these admissions eliminated the question of repairs, and present conditions of the track, leaving as the only justification for discontinuing service on this track to the Warehouse Company, this refusal and failure to sign the contract, and in fairness and justice, to-, respondents said admissions should be considered and the same are hereby pleaded as an estoppel as against complainant, now insisting on what was then waived.

It is denied that compliance by complainant with the order of the Georgia Public Service Commission would cause them to suffer a loss of $6.00 per car, or a loss of $700.00 per year, or any other amount.

Respondents say that service never ceased to be rendered on this siding until August 15th, 1923.

4. Respondents in answer to the allegations of paragraph 7 in bill of complaint, admit that the map and pictures represent what they purport to represent and that a charge of $2.50 is made for switching.

It is denied that the charge of $2.50 does not cover the actual out of pocket cost of service..

It is admitted that for placing loaded cars that come into Atlanta on plaintiff's road, no switching charge is made.

The other allegations of said paragraph can neither be admitted nor denied, for want of sufficient information.

5. Respondents admit the allegations of paragraph 8, setting forth the Code Sections of 1910 Code.

It is admitted that contracts were submitted to the National Bonded Warehouse, and that the copy attached as "Exhibit No. 3" contains the provisions embraced in the contracts submitted to be signed, but

at the same time the contracts were submitted estimates of cost of the changes were also submitted to the National Bonded Warehouse.

The other allegations of this paragraph can neither be admitted nor denied, for want of sufficient information.

6. Respondents in answer to the allegations of paragraph 9 of [fol. 57] bill of complaint deny that neither the nature nor the extent of the National Bonded Warehouse differentiate it from other businesses in that vicinity, and along the lines of the Western & Atlantic Railroad and the Nashville, Chattanooga & St. Louis Railway.

Respondents deny that it is necessary to discontinue service on this side track, in order to comply with Section- No. 2, and 3, of the Interstate Commerce Act, the Elkins Act and various laws inhibiting preferences and discriminations. Respondents deny that obedience to the order of the Georgia Public Service Commission would be a discrimination by the Western & Atlantic Railroad against all other shippers, interstate and intrastate, in the States of Kentucky, Alabama, Tennessee, and Georgia, in favor of the National Bonded Warehouse Company.

The other allegations of fact in said paragraph can neither be admitted nor denied, for want of sufficient information, and the conclusions of law alleged demand no answer from respondents.

7. The allegations of paragraph 10 are denied.

8. The allegations of paragraph 11 are denied, except as herein admitted. Respondents admit that the complainant does not make a switching charge for business moving over its line of road, destined to the tracks of the National Bonded Warehouse.

9. Respondents in answer to the allegations of paragraph 12 admit that non-compliance with the order of the Georgia Public Service Commission would make complainant ame-able to the penalty provision of the law, but deny the same are excessive. Respondents deny that to obey the order of the Georgia Public Service Commission would subject complainant to the penalty provided for in Sections 8 and 10 of the Interstate Commerce Act, Elkins Act, for the violation of Sections 2 and 3, of the Interstate Commerce Act.

10. These respondents deny the allegations of paragraph 13, except as herein admitted. They admit that the residences of the re- [fol. 58] spondents are correctly given in said paragraph. These respondents deny that complainant is entitled to any of the relief prayed for in said paragraph.

11. These respondents, in further answer to said bill of complaint, say that complainant cannot adopt any form of contract for public or private sidings, or fix any arbitrary or reasonable classification, demanding contracts from one class, and supplying service to another class, without a contract, which will defeat the power and authority of the Georgia Public Service Commission to direct and demand service on said side track, whenever the same is practicable,

and the business done thereat justifies the same. Under the law, the Georgia Public Service Commission is authorized and empowered to prescribe rules with reference to spur tracks, and side tracks, with reference to their use, removal, or change, and with full power to compel service to be furnished manufacturing plants, warehouses, and similar places of buiness, along the lines of rail when, in the judgment of the Commission, the business is sufficient to justify same, and on such terms and conditions as they may prescribe.

These respondents, in further answer to said bill of complaint, say that the side track on which the Georgia Public Service Commission has ordered service to be restored, under its order, which is attacked by complainant, is a public side track and not a private one; that the side track on which service has been ordered restored is a side track built by the railroad many years prior to March 1st, 1920, and before the erection of the building or the establishment of the business conducted by the National Bonded Warehouse, or its predecessors thereat, and it was most likely due to the fact that this side track and service thereon was available, is the cause of building being erected and the business established therein. The side track is constructed on the right-of-way of the railway company, is a part and parcel of the system of railroad trackage, can be and has been in the past, computed both in terms of mileage and in value by the railroad and the rate-making authorities, in determining, arriving at and fixing just and reasonable rates, which the railroad can and does [fol. 59] charge for the transportation of freight and passengers. Furthermore, the track is safe in its present condition, and is a continuation of siding already in use and operation, serving property lying adjacent to this property and between this property and the switch.

Furthermore, the track could, and was for many years, and until recently, extended beyond this property to other property where others could have enjoyed its use and it was a matter of convenience to the railroad and others who could have been served by an extension of this track, rather than a necessity, which prompted the railroad to change it and put in another siding to serve others, who might have been served by the extension of this track.

Having fully answered said bill of complaint, these respondents pray to be hence dismissed, with their costs in this behalf expended.

W. E. Watkins, Solicitos for Respondents.

[fol. 60] Jurat showing the foregoing was duly sworn to by W. R. McDonald and Paul B. Trammell omitted in printing.

[File endorsement omitted.]

[fol. 61] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION

[Title omitted]

STATEMENT OF EVIDENCE

Statement of Evidence to be Included in the Record of the Appeal of Complainant in the Above-stated Cause, Prepared, Approved, and Filed to Conform to Equity Rule 75

Upon the hearing of said cause the complainant introduced in evidence the following:

Exhibits 1, 2, 3, and 4 to the bill of complaint, which have been specified in the precipe herewith filed to be transmitted as part of the transcript of the record in said *cuase* and will be so transmitted, which are not of such character as to admit of substantial condensation, and which, therefore, need not be set out herein.

Also, affidavit of H. C. Hill, accompanying Exhibit No. 2 to the bill of complaint (the photographs attached thereto), to the effect that he took them and that they correctly portray the tracks serving the National Bonded Warehouse Company at 1000 Marietta Street, Atlanta, Georgia.

Also the affidavit of W. P. Bruce, attached as Exhibit No. 5 to the bill of complaint, to the following effect:

[fol. 62] AFFIDAVIT OF W. P. BRUCE

I am the General Manager of the Western & Atlantic Railroad and of The Nashville, Chattanooga & St. Louis Railway, which, under lease from the State of Georgia, operates the Western & Atlantic Railroad.

Prior to my appointment as General Manager of the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway on July 1, 1918, I had had about forty years' experience in railroad service in the capacities of telegraph operator, station agent, train dispatcher, chief train dispatcher, yardmaster, trainmaster and Superintendent, and was from January 1, 1900 to December 31, 1901 Trainmaster, and from January 1, 1902 until June 30, 1918 Superintendent and also Chairman of the Board of Control of the Nashville Terminals, a joint organization having control of and operating the terminals of the Louisville & Nashville Railroad and The Nashville, Chattanooga & St. Louis Railway in the City of Nashville, the Terminals embracing all of the main tracks, yard tracks, freight and passenger facilities of both roads within certain defined territory in the City of Nashville, in which territory all of the industries operating on private sidings are located.

In my capacity as Trainmaster of the Nashville Terminals I was familiar with the policies and practices of The Nashville, Chattanooga & St. Louis Railway with respect to the terms upon which

industrial tracks were constructed and maintained, and in my capacity as Superintendent and Chairman of the Board of Control of the Nashville Terminals, all negotiations covering the use of railroad property by industries and all negotiations covering the construction, maintenance and operation of industrial tracks in the terminal territory of The Nashville, Chattanooga & St. Louis Railway, were conducted by me.

[fol. 63] In the beginning of my administration as Superintendent practically every industrial track located in the territory of The Nashville, Chattanooga & St. Louis Railway had been constructed and was being maintained entirely at the expense of the Railway, and all industrial tracks constructed in its territory, with one exception, until the year 1907 or 1908, were constructed and maintained at its expense, and it was my understanding that this same policy was followed at other points on the System, especially at points where there was competition with other railroads. It was my understanding that this policy was followed for the purpose of encouraging the location of industries along its line. There was no fixed policy and few if any two contracts, where there are contracts, were the same. There was no system whatsoever.

Owing to the steadily increasing number of industries demanding sidings, and the heavy expense to the Railway of constructing and maintaining such tracks, and the steadily increasing terminal costs of handling cars to and from private or industrial sidings, the latter cost, I am advised, never having been adequately taken into consideration in the fixing of freight rates from one city or town to another, the Management was forced, as an economical measure, to make some change in its policy regarding the terms for constructing tracks for private use and adopted the plan of dividing the expense, the applicants being required to furnish the cross ties, switch ties and do the grading or pay the cost covering these items, the Railway furnishing the rail and the labor to build the tracks, the maintenance being divided on the same basis, that is, the industry furnished the ties for renewals and the Railway furnished the rails needed for renewal, the same basis being applied in all cases in order to avoid discrimination under the Commerce Act. So, too, we found that to systematize the maintenance and construction, a fixed policy was essential.

The switching of cars to and from an industry located on a private siding is not confined to the cars arriving and departing over the railroad which gets the road haul revenue and on which the industry is located. The road on which the industry is located is also re-[fol. 64] quired to switch cars consigned to these industries arriving and going forward over other lines, embracing competitive as well as strictly local business, and on such business switched for other lines the switching line receives only a nominal switching charge. this charge in Atlanta -veraging $2.25 per car, while today it is actually costing the Western & Atlantic Railroad approximately $8.12 on each loaded car switched to and from industrial tracks in its Atlanta terminal, including a proper portion of the interest on the

value of the property used in performing the service. The cars handled over the line of the road on which the industries are located, are switched to and from the industries' tracks free of charge. It will thus be seen that this Railway is put to an enormous expense in switching cars to and from industrial sidings, which is absorbed in the line-haul revenue, there being no extra charge for the performance of this additional service. Such service saves the industry drayage and adds nothing to the Railway's revenues.

The present cost per car for delivering cars to connections in our Atlanta Terminals is $4.64; moving to or from industries, $8.12; to or from freight house, $9.35; to or from team tracks, $7.56; the average cost of the various classes of services being $8.18.

Private sidings are an essential part of the plant facilities of an industry requiring the use of such tracks in connection with the operation of their plant, from which use the industry receives free storedoor or plant delivery, this saving the expense of draying between public team tracks and their place of business. Therefore, it is a reasonable proposition that every industry requiring such track service should pay the cost of construction and maintenance.

The Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad continued the policy of dividing the expense of construction and maintenance of industrial tracks until the Government took over the operation of the railroads in December 1917, when it, through the Director General of Railroads, by his General Order No. 15, dated March 26, 1918, prescribed rules applying to all government-operated railroads in respect to the terms upon which industry tracks should be constructed and maintained, placing the en- [fol. 65] tire expense upon the industry with certain modifications, a copy of which, together with Supplements Nos. 1 and 2 thereto, are hereto attached marked "Exhibit C". This order clearly indicates the views of the Government or the Railroad Administration on the equities of the distribution of expense of industry track construction, the order itself placing the greater part of the expense of construction and maintenance upon the industry, and finally, by Supplements Nos. 1 and 2, placing practically the entire cost upon the industry. Even though the industries are required to pay the entire cost of construction and maintenance of such tracks, the Railway is in many cases put to considerable expense in connection therewith by the necessity of providing at its expense additional switching tracks or the extension of existing switching tracks over which to operate its engines and cars in switching industrial tracks in order to avoid the use of the main tracks in performing this switching service. As an example of the expenses assumed by the railroads in connection with the construction of industrial tracks at the industries' expense, the case of the recent construction of a side track to serve the Bragg-Millsaps & Company's stock barn (next door to the National Bonded Warehouse, Inc.), in the City of Atlanta, is cited. The cost to the industry for the side track to serve their plant was estimated at $1,673.00, while the cost of extending the switch track with which to connect the industry track was estimated at $2.445.00. It was necessary to extend the lead or switch track in order to provide a

track other than the main tracks of the Railway, upon which to stand cars while the engine is switching cars to and from the industries, so that the main line movements would not be interfered with.

At the end of government control (March 1, 1920), the Management of The Nashville, Chattanooga & St. Louis Railway and Western & Atlantic Railroad, realizing the necessity for economical operation of the roads, adopted the policy of requiring all industries to bear the entire expense of construction and future maintenance of private sidings, and issued instructions that in all cases of change in ownership or tenants of property being served by private tracks previously constructed and maintained at the expense of the Railway, the new [fol. 66] owners or tenants should be required to sign our standard contract providing that the industry assume the cost of maintenance of the track, also containing a fire release clause and an indemnity clause. This policy has been strictly adhered to on the entire system.

More than half of the industrial tracks constructed prior to July, 1918, were installed at the expense of the Railway and are still being maintained at its expense. Many industries on this Railway, including quite a number in Atlanta, are located adjacent to railroad property in the business district of the city where the value of the property is very high, and are being served by tracks located on railroad property upon which they pay no ground rental.

We have on this Railway approximately 1,050 side tracks used exclusively for serving industries, aggregating 187 miles of track. Our Engineering Department advises that the present cost of maintaining industrial tracks is $974.00 per mile of track per annum, including the cost of switch ties, cross ties and labor, or a total annual cost of $182,138.00. Many of the industrial tracks constructed at the expense of this Railway which have not changed ownership or tenants, are still being maintained at the expense of this Railway, involving a heavy expense from which it should be relieved.

A standard or uniform policy is essential, first, to avoid preferences and discriminations; second, to facilitate efficient economical administration. Our policy was necessary to enable us to avoid the ever increasing and uncompensated cost of terminal switching. It is a fair policy because the industry receives an extra and valuable service over and above the line haul.

We are making an effort to bring about equality and uniformity and put an end to the preferences and discriminations brought about by the old condition.

We are only asking the Warehouse Company to do what we ask all others to do—nothing more nor less. The Georgia Commission has ordered us to switch for this concern without any contract and, if we obey, it will receive transportation service at less "net cost" to it than others under similar circumstances and conditions.

(S.) W. P. Bruce.

Sworn to and subscribed before me, this 3rd day of September, 1923. R. T. Saunders, Notary Public. (Seal.)

[fol. 67] The Exhibit referred to in said affidavit as Exhibit "C" thereto, is the same as Exhibit No. 4 to the bill of complaint in this

cause, which has been specified in the said precipe and which therefore is not set out herein.

Also, another affidavit of said W. P. Bruce, (made subsequent to the making of the asdavit of the same witness last above set forth) which was to the following effect:

I appeared before the Georgia Public Service Commission as a witness. I was asked while on the stand the number of contracts which the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway had had executed in accordance with the present uniform policy, but was unable to state the exact number. Since being on the witness stand I have had a complete check made and find that during Federal Control there were forty contracts executed; since Federal Control one hundred and thirty-four contracts have been executed; making a total of one hundred and seventy-four industrial siding contracts that have been executed by industries along our lines. These contracts embrace two conditions, first, the construction of a new siding and, second, the location of a new industry on an existing industrial track. Since Federal Control terminated, February 28, 1920, no industry has come upon our property, either on an existing industrial siding or a new siding, but that has signed our form of contract. We are now giving consideration to the matter of having every industry served by our lines execute our standard form of contract and, while we realize that it will take time and possibly some litigation to bring the same about, it is our intention to do so and to expedite the matter as much as possible.

[fol. 68] EXHIBIT IN EVIDENCE

Also, copy of the answer filed by the Western & Atlantic Railroad with the Georgia Public Service Commission, in response to the order of August 17th, 1923, to show cause before it in re National Bonded Warehouse, Inc.

The copy answer was introduced under stipulation of counsel in the cause that it was a correct copy and might be introduced in lieu of a certified copy.

Said answer was as follows:

1. On August 9th, 1923, the Georgia Public Service Commission made the following order:

"Please refer to your letter of August 2nd addressed to the National Bonded Warehouse Company, Atlanta, notifying that Company that unless they signed your standard form of contract covering side tracks, you would discontinue serving them after August 15th, next, etc.

The Commission hereby directs you that you do not discontinue serving the National Bonded Warehouse Company on the side track in question until the matter has received the consideration of this Commission. In the meantime, the Commission will be glad to hear from you in the matter."

On August 17th, 1923, the Georgia Public Service Commission made the following order:

"In re Complaint National Bonded Warehouse Company, Atlanta, Account Side-track Service

You are hereby ordered to show cause, if any you can, before the Georgia Public Service Commission at its offices in the State Capitol, Atlanta, on August 28th, 1923, why a permanent order should not be issued, directing your Company to restore side track service to the National Bonded Warehouse Company, Atlanta."

2. Prior to the making of said two orders no written complaint was filed in accordance with the published rules of the Georgia Public Service Commission, nor was any hearing accorded the Western & Atlantic Railroad or The Nashville, Chattanooga & St. Louis Railway, lessee.

The Western & Atlantic Railroad avers that the making of said orders, without any hearing, was contrary to the laws of the State of Georgia and to the Fourteenth Amendment to the Constitution of the United States, in that it constituted a denial of due process of law.

3. Neither of said two orders of the Georgia Public Service Commission refer to or are predicated upon General Order 14 of said Commission. However, a letter written by the Chairman of said [fol. 69] Commission, dated August 10th, 1923, contains the following:

"I regret that you do not appreciate the action of the Commission in directing that this service be restored, and your attention is called to the Commission's General Order No. 14. The Commission knows of no reason why this side track service should be discontinued,—no application from your Company having been made to the Commission for such authority, which is necessary before the service can be discontinued."

General Order No. 14 was promulgated December 23, 1909, and is as follows:

"All rates now in effect or which may hereafter become effective, which are not higher than the maximum rates prescribed by this Commission, whether such rates are the result of voluntary action upon the part of any company, corporation or person subject to the jurisdiction of this Commission, or otherwise, are hereby established as the rates of the Railroad Commission of Georgia, and no such rates shall be discontinued nor raised without the consent of the Railroad Commission first being obtained, but all such rates shall continue in force without hindrance, the same as other rates prescribed by the Commission. And any and all facilities, privileges or service, now in effect or practiced, or hereafter made effective, extended, or practiced, which give, grant, extend or allow patrons, shippers or other persons transacting business with said companies,

corporation or other persons as much or more of the privileges, facilities or service to which they are entitled by law or by any rule, regulation or order of this Commission, whether such privileges, facilities or service are given, granted, extended or allowed as the result of voluntary action upon the part of such companies, corporations or persons, or otherwise, are hereby established as the requirements of the Railroad Commission of Georgia, and no such privileges, facilities or service shall be discontinued without the consent of the Railroad Commission first being obtained, but all such privileges, facilities or service shall be given, granted, extended or allowed without hindrance, the same as other requirements of this Commission; provided that nothing herein contained shall operate as repealing in any way the provision of Passenger Rule No. 7."

Said General Order No. 14 purported on its face to amend the Commission's circular No. 314, which was as follows:

"Atlanta, Ga., January 20, 1906.

"Effective this day, all rates now in effect between points in this State, which are not higher than the maximum rates prescribed by this Commission, whether such rates have been published voluntarily by the railroad companies, or otherwise, are hereby formally established as the rates of the Railroad Commission of Georgia, and no such rates shall be discontinued nor raised without the consent of the Railroad Commission first being obtained, but all such rates shall continue in force without hindrance, the same as other rates prescribed by this Commission."

Said Circular No. 314 did not purport to relate to industrial sidings or similar tracks, but related solely to transportation charges, and the Western & Atlantic Railroad avers that the Amendment thereto, viz.: General Order No. 14, as properly construed likewise relates to transportation charges, and does not embrace within its [fol. 70] provisions the construction, use, maintenance or abandonment of industrial sidings. That such construction is the proper one is clearly demonstrated by the contemporaneous construction of the Railroad Commission of Georgia (the statutory name of the predecessor of the Georgia Public Service Commission). As an example, in the Thirty-seventh Report of the Railroad Commission of Georgia for the year 1909, page 13, under the heading "Depots and Side Tracks," the Commission there said:

"Each case, of course, stands upon its own merits and the conditions peculiar to each. * * * In case of side-tracks, where the Commission is of the opinion, after due investigation, that the track should be constructed, an order is issued requiring that same be put in upon the usual terms upon which the railroad company, at interest, constructs and maintains side-tracks, the time allowed for the construction of side-tracks depending upon the conditions surrounding each case, as to the length of the track to be con-

structed, amount of work necessary in grading and other conditions peculiar to each case."

This in itself was but a repetition of what had previously been declared to be the practice which had been adopted by the Commission in the Thirty-sixth Annual Report, which was the first Report made by it after the passage of the law giving it jurisdiction as to side tracks, to-wit: the Act of Aug. 22nd, 1907.

For many years thereafter, in each Annual Report, said Commission continued to set forth its General Order No. 14 as above quoted, and at the same time continued to set forth the provisions with reference to industrial or side-tracks above quoted, showing all the time that it never construed its own General Order No. 14 as being applicable to side or industrial tracks.

In addition to what has just been stated, the Commission has always, up to the present time, given a special and separate handling to complaints concerning the construction, maintenance and use of side tracks or industrial tracks, and, also, to complaints made with regard to the withdrawal of facilities which had been theretofore accorded, in the way of provision of side tracks or industrial tracks.

4. If said General Order No. 14 can properly be construed as applying to such a facility as an industrial siding, then to that extent said General Order is invalid as being beyond the powers vested in said Commission by the legislative enactments of the State of Georgia. While Sections 6 and 7 of the Act of August 22, 1907, in- [fol. 71] creasing the powers of the Railroad Commission of Georgia, give it the right to make general orders in some instances, it does not give it power to make any general order with reference to an industrial siding. Section 6 is limited to public facilities which the public at large have the right to and can use, such as depots. Section 7 gives the Commission the power to make special orders with reference to industrial sidings but only after hearing and then subject to such terms and conditions as the facts, as disclosed by the evidence in each particular case may warrant. It gives the Commission no power to make any general order relative to such sidings and the incidental service.

The Western & Atlantic Railroad avers that the siding in question is an industrial siding, properly termed a plant facility, construction, maintenance and operation of which is for the sole convenience of the National Bonded Warehouse, Inc. With reference to such a facility the Commission has no power to prescribe any order save only after hearing.

5. The National Bonded Warehouse, Inc., was chartered under the laws of Georgia in the month of May, 1922, and located alongside the right of way of the Western & Atlantic Railroad, in the City of Atlanta, on an old industrial siding which had formerly been used by another and different industry previous to the location by said Warehouse at this place.

After said industry located upon this property it made application to the Western & Atlantic Railroad for switching service over said industrial track. Said railroad offered to furnish said service upon the same terms and conditions upon which it furnished such service to other industries similarly situated, which were: The industry should pay the cost of putting industrial track in operating condition together with the annual maintenance expense for that purpose and execute a contract containing various provisions for the safety of the railroad and its employes in serving said side-track.

The Warehouse company objected to some of the provisions of said contract, particularly with reference to the furnishing by it [fol. 72] of crossties, and negotiations dragged along until finally it definitely decided not to execute the contract at all. Thereupon the railroad gave the industry 9 days' notice that it would either have to execute said contract or switching service would be discontinued. The industry refused to sign, and said switching on said industrial track was accordingly discontinued.

Said industrial siding is and can be used only by the National Bonded Warehouse, Inc. The physical condition of the property is such that no other shipper or industry could possibly use the track alongside the warehouse company's property. The railroad has not, and cannot, use it for its general business, and it can be used only for placing care to be loaded or unloaded for said warehouse company. The construction, maintenance and operation of said industrial siding not only adds nothing to the revenues of the railroad, but to the contrary increases the cost of operation over the cost of delivery to public team tracks which are located within two blocks (being approximately 1,600 feet) of the National Bonded Warehouse. Said public team track is of sufficient length, and its construction is of such character as that all business to and from said warehouse company can be conveniently handled thereon. In other words the public facilities are thoroughly adequate.

The construction, maintenance and operation of said industrial siding is for the sole convenience of the National Bonded Warehouse, Inc. Eighty-five per cent of the business of said Warehouse over the Western & Atlantic Railroad moves interstate.

6. There are on the lines of the Western & Atlantic Railroad and its lessee, The Nashville, Chattanooga & St. Louis Railway, hundreds of industries whose business and location, so far as the transportation and handling are concerned, are substantially similar to that of the warehouse company. All of these industries are treated exactly alike and all of them have executed the railroad's standard side-track contract. Since 1920 every industry locating on the lines of these two roads has executed said standard form of contract; this being essential, first, to the end that the industry may bear a reasonable share of the cost of constructing, maintaining and [fol. 73] operating industrial sidings; second, as a matter of administration some standard is necessary, and; third, because under the laws all persons and industries, under similar conditions, must be treated alike. For twenty years prior to Federal Control of rail-

roads the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway had been striving to bring about uniformity in industrial track service. For about fifty years prior thereto there had been no standard, no fixed policy, hence frequent preferences and discriminations. These roads have been and are making an earnest effort to put all on the same basis.

The Western & Atlantic Railroad avers that should it continue to serve the National Bonded Warehouse, Inc., without the execution of any contract, as directed by the Georgia Public Service Commission, it would violate Sections 2 and 3 of the Interstate Commerce Act, and Section 1 of the Elkins Act, because to do so would be an undue preference to the Warehouse Company and an unjust discrimination in its favor and against other industries similarly situated. For this reason, said orders of the Georgia Public Service Commission, above quoted, being inconsistent with the paramount Federal law, as well as unreasonable per se, are illegal and void and should not be made permanent.

[fol. 74] There was introduced in evidence, also, for the use of both complainant and defendants in the cause, the evidence of the various witnesses before the Georgia Public Service Commission, in the hearing before it on said rule to show cause, as taken down, transcribed and verified by the Official Stenographer of said Commission.

This evidence was introduced under stipulation of counsel in the cause that the same might be used upon the hearing for injunction as though in the form of affidavits taken and entitled in the cause.

Said evidence was to the following effect:

[fol. 75] SUMMARY OF EVIDENCE BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

IN RE NATIONAL BONDED WAREHOUSE COMPANY

SCHMID, Division Engineer:

The industrial track before Warehouse property is 249 feet long and is marked in red. Entire track serves only two industries and it is not possible to serve others with it. Not in safe condition. Will require $450.00 to make it so and annual maintenance charge of $43.00.

Public team track within 1,600 feet.

Essential to have uniform policy as to industrial sidings:

(1) To enable information to be intelligently given to intending patrons.

(2) Saves enormous labor in preparation of contracts for new tracks or new users of old tracks.

(3) Essential to have standard clearances provided for, to prevent serious dangers.

(4) To enable maintenance of the track to be attended to by section foremen, under uniform contract.

Since termination of Federal control every new track which has been built, and every new user of old track, has required signature of our standard side track contract.

Warehouse Company moved to its present site about May 1922. There was then a track in usable condition in front of the property. It is now in very bad condition.

From an operating standpoint the business of the Warehouse Company is not different from that of various industries in Atlanta and there is no transportation or traffic reason for furnishing them a siding on better terms than their competitors and other industries.

In negotiating with them all we have asked them to do is to conform to our standard policy. Have not asked them to do anything unusual or in addition to what we have asked others to do.

The Warehouse Company in the siding and its platform use property of the railroad worth $1,509.00.

T. M. Wilson is district freight agent. Not a part of his duty to be familiar with the property nor with operating conditions. The [fol. 76] side track is on the railroad property. About two cars can be placed on it conveniently for loading and unloading.

The entire length of the track is 695.7 feet. The adjoining property is that of Shippey and the Warehouse Company. Shippey could use the end nearest the main line. The general public could not without using Shippey's property or that of the Warehouse Company. There is no physical reason why they could not, with permission of these owners.

This track has been there since before 1915. Since then I have not been furnished with any contract made when the track was originally put down. There was none with the Warehouse Company. The building was there. The Warehouse Company did not build it. It has been using the track since April or May 1922. Prior to that it was used by Dixie Paper & Box Company. Occasionally Bragg, Milsaps & Co. had a car placed on the end of the track at the sufferance of Monroe, the owner of the land. It was physically possible to extend the track down to Bragg, Milsap's property, but it would have made a miserable operating condition for them, because they would have been on the far end of the track with two other users ahead of them and to place a car for them it would have been necessary to disturb these other users, and possibly delayed placing of cars. It was practicable to have extended the track on down through their property. I don't think the railroad would have extended the track because it was four or five feet higher than the other tracks in that vicinity and that was an objectionable feature.

In putting in the track which the railroad has put in for Bragg & Milsaps Monroe's land was not touched. I moved the track serving the Warehouse Company eastwardly about 15 feet. I had to because the dirt excavated was for the location of the track.

The Uniform policy of the railroad was adopted about 1920. The Warehouse Company had not been using the track until April or May 1922. Somebody else used it before that time. No one who has moved on our line since 1920, when this policy was inaugu-

rated, is using an industrial or spur track, who has not signed the contract.

The track and building were there, the building was partially [fol. 77] burned.

Redirect:

We have not asked the Warehouse Company to pay any proportion of the expense of putting the track that Shippey uses in good order or maintaining it. The only portion our contract which was submitted to the Warehouse Company related to was the 249 feet immediately adjacent to the property owned by the Warehouse Company. So far as that property is concerned nobody else has used the track or can use it without coming over the Warehouse Company's property.

The W. & A. R. R. main line is immediately adjacent to this spur track and beyond that the Southern Railway. The Milsap's track referred to has recently been put in and that company has signed the standard form contract, the same sort of contract submitted to the Warehouse Company, and has paid for the construction and agreed to take care of the maintenance; the only difference being that there is an entirely new construction as to the Milsaps track and a question of renewal only as to the Warehouse Company.

The Railroad Company has declared that it will not construct spur track for industries, such as the Warehouse Company, except in accordance with the standard form of contract. The end of the track formerly serving the Warehouse Company has been moved about 15 feet eastwardly—just swung around. This change did not affect the ability of the railroad to serve this warehouse, the shift made no difference as to service.

Recross:

It would take a little over $400.00 to put this track in good condition. I conversed with Monroe along that line, but don't know whether a demand was made on him or not. I do not make such demands; that is for the Superintendent.

We did not discontinue the service because the track was in bad condition but because there was refusal to sign the contract.

(Respondent here admitted that the only reason it had ceased to serve the Warehouse Company was because the latter had declined to execute the uniform contract of respondent.)

The service was stopped on August 15. Prior to that time con- [fol. 78] tinuous service had been given the Warehouse Company on that track.

J. A. Baldwin:

Am Superintendent of the Western & Atlantic Railroad and have been for eight years. Am familiar with the lay of the land and tracks about the Warehouse Company property.

We submitted the Warehouse Company our standard form of con-

tract May 15th, 1922. Negotiations continued for some time with its officials about the terms of the contract. We submitted to them the uniform contract in the spring of 1923. They finally refused to sign it. That contract was precisely the same as the one we submitted to other industries in Atlanta and on the entire Western & Atlantic Railroad and the Rome Branch.

From May 1st, 1922, through August 14th, 1923, the Warehouse Company received on this track from other railroads 175 cars and from the W. & A. R. R. 87 and there were 52 outbound cars, making total of 314. Of the cars which came over the W. & A. R. R. about 85 per cent were interstate. Practically two-thirds of the business handled on our track goes over other railroads. We have three public team track yards in Atlanta at which any patron of the road may load or unload freight. One such track is within 1600 feet of the Warehouse Company, and it is of sufficient size to adequately handle the public business offered at that point, including the business the Warehouse Company does. We operate fifteen switch engines a day in Atlanta.

Since termination of Federal control, and commencing March 1st, 1920, there has been a uniform policy with reference to construction, maintenance and use of industrial sidings on the Western & Atlantic Railroad and we have not varied one bit from that policy since that date. Every new industrial siding constructed since that time has been constructed after execution of the standard form of contract. Where there was an old track in existence, and an industry moved on to it, in each such instance the standard form of contract has been signed, except the Bonded Warehouse.

Witness then gave names of industries along the W. & A. R. R. which had signed the standard form of contract during the period [fol. 79] mentioned, including several who had moved on to old tracks.

The industrial siding recently constructed for Bragg, Milsaps & Co. was constructed after execution of our standard form of contract. It is just to the right of the track in front of the Warehouse Company. Mr. Shippey, just to the left of the Warehouse Company, paid for the construction of his track; and for the portion of the track in front of Mr. Shippey's property marked 157.3, we do not switch cars because he has executed no contract; and the only switching we do for him is on that portion of the track in front of the figures marked 150.10.

Where the figures 274 appear, further to the left on the map, the furniture company is located. It has signed the standard form of contract. At the far left side of the map is another company, which has also signed it.

Since 1920 we have made no variation or exception in the matter of construction or maintenance of industrial sidings.

Cross:

From May 1st, 1922, to Aug. 14, 1923, 314 cars were placed on and taken off that track (Warehouse Company). On these freight

charges were paid. The old industrial plants, located along the Western & Atlantic Railroad, have not signed the standard form.

This track was built first for the Palmer Brick Company, who were located just beyond this Bonded Warehouse and the track originally extended on down to the Milsaps property. There wasn't anybody else on there. Whether if there had been we would have been willing to serve them, I couldn't answer. Where a person owned the property or had a right to be on it we would have served them, before the present time.

This same siding was there when the Bonded Warehouse was built. I judge that as a rule industries prefer to go where they can get sidings. Whether, when this contract was originally submitted to the National Bonded Warehouse Company, the railroad agreed that if it were signed certain objectionable features of it would be stricken, is not true to my knowledge.

Nobody stated, in my presence, to the Warehouse Company or to [fol. 80] Mr. Monroe, its Manager, that the Railroad Company would fight him for two years in the courts, if he did not sign this contract; nor do I know that a similar statement was made to Bragg & Milsaps. Mr. Trabue was here negotiating with the latter but if he told them that, I don't know it. I don't remember his saying anything like that. I was not present during all the conversation.

Redirect:

On the cars that come over the W. & A. R. R. and switched to the Bonded Warehouse Company siding they pay no switching charge; they pay precisely the same as if unloaded at the public team track.

No offer to modify our standard form of contract was made with my knowledge or approval, nor have I heard of it since.

Recross.

I couldn't answer, off hand, how many who are using the old tracks have not signed this standard contract. I judge there are more than the number of those that have signed it.

The witness was asked, if Mr. Monroe was there five years before this time, "why do you want to make him sign this, and leave those other fellows out without signing it".

By permission of the Commission and counsel, the question was answered by counsel for the respondent, as follows:

In the early days we put in side tracks frequently without any contract at all; unquestionably we favored some and discriminated against others; if we put a track in for A on terms entirely different from those on which we put in a track for B, and on still others for C, the result was a preference and discrimination. There are many reasons which will be detailed by our General Manager why we have been forced to bring about a uniform policy. In order to avoid discrimination and preference under the law, we have got to serve everybody that is in the same condition, alike.

It is an impossibility to correct in a few months, or a few years, inequalities that grew up during seventy-five years of operation. We have determined upon a policy that we believe to be fair and reasonable. Every industry that comes on must conform to that standard [fol. 81] policy; and as we get to them, when we can, every industry that has been there, if it has been there for fifty years, is going to be asked to give up its old contract, if it had one, and if it had none, to come in and execute our standard form; if they refuse, then in the appropriate legal way, we are going to see if we have the right to compel that old industry to give up its old contract, if it had one, and make a new one, or if it had none, to adopt our standard form.

The guiding principle with us has been this: we have to treat everybody alike, that was not done in the early days, and we are now trying to correct the inequalities that have existed up to this time, and we are doing it just as fast and as fairly as we can. Of course, in the nature of things, it is the management of the road that has got to determine the standard form of policy. We concede that the various State Commissions, and ultimately the Courts, have unquestionably the power to say whether Section 1 or Section 2 or Section 3 is reasonable or unreasonable. That is not the question here. We asked these gentlemen to sign a contract and they refused. This Commission has ordered us to switch cars without any contract whatsoever. If you had said, "Come in here, and let's see what would be a reasonable contract, let's discuss the various provisions, and see if your Section 1 is fair, and if your Section 2 is fair", that would be an entirely different case, but what you have ordered us to do is to switch without any contract at all.

The Bonded Warehouse Company was incorporated in May, 1922; it became a new industry on our line at that time; it then became essential, under our policy, that they adopt our standard, and we immediately submitted it to them. They wrote letters backwards and forwards, negotiating, the thing drew out interminably long and we finally submitted it again and they said they would not sign any contract. We said to them they would have to sign it or we would discontinue service. The only thing that actuated us was the feeling that we have to treat everybody alike; Milsaps, on one side, and Shippey, on the other, and the other industries to the right and to the left of them were being compelled to sign this contract, and we said we could not give you service except upon the same terms and [fol. 82] conditions as the others. That was the whole situation that brought this matter up. We are operating through four States, and have 1,051 industries on our line. We are confronted with that is really a very serious and difficult problem to standardize our contract. It is a hard proposition and particularly where an industry has been there for twenty-five years, to go to them and say, we made a contract twenty-five years ago, you have got to tear that up and sign a new one that is very much more burdensome on you; but we have to do it if our appreciation of the law is correct.

We concede the right to any industry at any time to challenge the provisions or any of the provisions of our standard contract, as being unreasonable, and then that becomes a question for the Com-

missions and the Courts. But the point here is not whether we shall switch for them, not under this condition or that condition, but without any contract at all.

I don't think our position in effect abrogates the Georgia law on the subject of the construction of spur tracks. Here is the Warehouse Company recently incorporated, they have come on an old track, that has been serving industries there for years; if they want service they can do one of two things, either sign our standard form or file a petition here and say, we want service and would like to have it on conditions that are fair and equitable, and ask you to lay down the conditions under which we shall have that service. Then this Commission would have the unquestioned power, in the first instance, to say whether our provisions that clearances should be 22 feet above the track and 7½ feet from the center on the sides, are fair, and whether our indemnity provisions, etc., are reasonable or unreasonable; you have unquestionably that jurisdiction.

We have a lot of sidings that we have no contracts with, but every industry that has come on our property since 1920 has signed the standard form, except this one concern; the industries that came on forty or fifty years ago, we have not yet approached, that is going to be our difficult practical problem and we are saving the hardest for the last.

This corporation was chartered in May, 1922; it came on to our [fol. 83] property then as a new concern. Of course, we had to start somewhere, and so when we finally got our fixed policy determined, we insisted that everyone coming on thereafter should sign it.

The reason we began at this particular time was:

A good many years ago the biggest shippers in this country were very much dissatisfied with various clauses in these industrial siding contracts; they said the fire indemnity clause was too stringent, imposed undue burdens, and that others were unsatisfactory, and so they filed a petition with the Interstate Commerce Commission, asking it to determine what would be a reasonable form of contract. Every standard railway in the country appeared or acknowledged the jurisdiction of the Commission and said they wished to have one fixed policy and let the Interstate Commerce Commission fix it. The Commission, in its decision reported in 61 I. C. C. 120, finally held it had no power, in the first instance, to determine upon a reasonable contract and order everybody to sign it; but that it did have the power in cases of discrimination, to remove the discrimination. Then they suggested that the shippers and the railroads try to get together. So these big shippers, the Industrial Traffic League of America, etc., all the big shippers, appointed a committee, and all the railroads did so, and all agreed upon the numerous provisions in their standard fire clause. Our standard fire clause is word for word in accordance with the agreement made by most of the big shippers of America, through a committee, and the railroads. That occurred about the time of the termination of Federal Control.

During Federal Control the Government saw that this matter had to be standardized, and so it issued its General Order No. 15 and Sup-

plements 1 and 2; and so, immediately after Federal Control and this litigation before the Commission having terminated and Federal operation having adopted the principle of uniformity, we said it was the time to commence what we had been after for years, to fix upon a fair policy and make everybody conform to that policy.

We are not contending that our contract is perfect, but my best judgment is that it is fair. I concede that the Commission has the power, after appropriate proceedings, to question the reasonableness [fol. 84] of the various provisions, but that is not the case here; we are perfectly willing to that; all we are trying to do is to eliminate the possibility of discrimination. We have to be protected against our own traffic solicitors, boosting our own business, as well as against the various industries. So now we say to our men: When you ask an industry to come on our line, you say, you have to sign that contract, and we will treat you exactly as we treat everybody else.

We were ordered to restore the service and we did not do it because we think we would violate the Interstate Commerce Act and the Elkins Act.

Witness Baldwin resumed: There are a number of industries on our line of railroad, who have sidings, who were on there prior to 1920, and still are using side tracks, we furnishing the service, who have not signed the contract, because we have not been able to get to them.

Q. Now the Dixie Paper Box Company, if it be a fact that they were on your line before 1920, under a uniform rule, they should stand on the same basis as those others that you are serving, shouldn't they?

A. Yes, and they should sign the contract also.

Mr. MONROE:

The Dixie Paper & Box Company is owned by myself. It does not own the building and the land. The Dixie Paper & Box Company has never written to the railroad company and asked to have a car put in there and been refused.

[fol. 85] W. P. BRUCE:

I am General Manager for the N. C. & St. L. Railway and the Western and Atlantic Railroad. Have had forty-six years of railroad experience in all classes of operation. Before coming to the N. C. & St. L. Ry., in 1918, I was Superintendent of the Nashville Terminals, a joint organization of the Louisville & Nashville Railroad and the N. C. & St. L. Ry., having charge of the property and yards and of the operation of the facilities in Nashville.

At the beginning of my administration as such Superintendent practically every industry track in use in the terminals had been constructed and was maintained at the expense of the N. C. & St. L. Ry. About 1903 or 1904 there was an increase in the demand for sites for location of industries and the management of the N. C. & St. L. Ry. realized that to continue their policy of bearing cost of construc-

tion and upkeep would be very burdensome, and about 1908 or 1909 they changed their policy and required industries applying for side tracks to bear part of the expense, while there was no strict uniformity, usually upon the basis of the industry furnishing cross and switch ties, doing or paying for grading, and the railroad either leasing or furnishing the rails and labor to construct the tracks, maintenance being provided for on substantially the same basis.

In connection with the expense to the railroad in participating even on this basis, there were other expenses in connection with operation of industry tracks, brought to the attention of the management in a forcible way and that was the increase in the cost of handling cars to and from industry tracks, caused by increase in number of industries to be served and volume of business of that kind, and increase in wages and cost of material.

Another feature of expense was in furnishing land upon which to locate industrial tracks, applicants for siding wishing to use the property up to the railroad property line for warehouse purposes and to have the railroad locate the siding on railroad property. I think there are very few instances in Atlanta where the industry tracks are not located on the railroad property. The industries have benefitted [fol. 86] in that way.

The cost of handling cars in terminals, especially those to and from industry tracks, was never taken into consideration in fixing rates from one town to another. At the present time it is costing us in Atlanta practically $8.12 per car for every loaded car delivered to or moved from a private industry track. The average cost of handling cars in all classes of service in the city averages $6.12.

So taking these matters into consideration, we concluded at the end of government control to continue the policy of the Railroad Administration of requiring industries to bear the entire expense of construction and maintenance of industry tracks. At the same time we instructed division officials that whenever there was a change of ownership, or tenants, doing business on tracks previously constructed at the expense of the railroad, the new owner or new tenant should be required to assume the expense of maintaining the track.

We have not so far determined upon any action looking towards taking up this question of maintenance with industries located on existing tracks where there has been no change in ownership of the business, or no change in the tenant of the warehouse or business house served by a track heretofore maintained by the railroad. I think it would be fair and reasonable to make some change in that respect, but while we have considered it we have not been able to determine just what would be the best thing to do, or just how to go about it.

The average charge for switching cars to and from industries located on our track arriving and going out over other lines in Atlanta is $2.50, while it costs us approximately $8.12 to perform the service.

All cars arriving over our lines or going out over our lines are switched to and from industries located on our lines without charge.

There are approximately 1,051 industrial sidings on our road, ag-

gregating 187 miles of track. The average furnished me by the Engineering office of the present day cost, is $972.00 per mile per [fol. 87] annum for maintaining industry tracks, including cost of cross ties, switch ties and labor.

It is absolutely essential, as a matter of facility and ease in administration, that we have some fixed and uniform policy for industrial sidings. It is not only necessary to avoid discrimination, but it is necessary in order to administer the affairs of the railroad in an expeditious and business-like way.

We believe it is our duty under the Transportation Act, which requires us to operate the property in an efficient and economical manner, to place the expense of industry tracks upon the industries, as we regard an industry track as a plant facility; it is a part of the plant from which the plant itself receives the sole benefit, without any benefit to us; it does not reduce our cost in serving them by their having a private siding, but, on the other hand, increases our cost.

It does not add a dollar to our revenue to construct and maintain and operate these industrial sidings; on the other hand, I think it would figure out about $185,000.00 per year to maintain the 1,050 industry tracks we have on our system, not taking into consideration the money spent by the Company in construction of the tracks. That is a very heavy expense and is not considered a proper operating expense.

The 249 feet of track alongside the Bonded Warehouse Company property can serve only that industry located on that property. The track is on an embankment four or five feet higher than our main tracks immediately opposite and adjacent and could not be reached by a vehicle of any kind on the track side if there were any roadway, and there is not, and it can only be used for loading and unloading stuff in and out of this Bonded Warehouse Company.

Since 1920, at the end of Federal Control, we have uniformly insisted upon the execution of our standard form of contract in cases of this sort and we have not varied one bit in favor of any individual or any concern. This is the first instance, that has come to my attention, where an industry has finally flatly refused to conform to that standard policy.

An expense that the railroads are put to in connection with the [fol. 88] construction of industrial tracks is, that in a great many instances it is necessary to provide track facilities for switching, in addition to the track serving the industry, in order to avoid the use of the main track upon which to stand cars while they are being switched in and out of the industry track. In such instances, we often are put to greater expense in providing what we term a switch track or switch lead, than the industry is where they pay for the industry track. For instance in the Bragg & Milsaps matter, which has been referred to on this hearing, the estimate showed that the cost to Bragg & Milsaps was, I believe, $1,673.00, while the cost to the railroad in extending its switching or lead track to enable it to switch to this industry without having to stand cars on the northbound main track, was $2,445.00.

We are compelled to assume this expense, because while it is in-

cident to construction of an industry track, it is necessary to bring about a safe and proper operating condition, and hence we feel it would not be proper to call on the industry to pay it.

There is nothing that I can see, either in the location of the Warehouse Company, or in the nature or extent or character of its business, that would justify us in treating that concern more favorably than other industries along the line. I don't see how there could be any. We would be discriminating in their favor if we treated them any differently than we have industries located on each side of them.

We have given serious consideration to industries that have been on our tracks for many years, some on the same old tracks, as to what we can do about them; and while we have agreed that eventually we have got to make them execute the same sort of contract, the actual details of how we are going to do it is a thing we have not worked out. Right now we are considering, and have been for some time, how we are going to meet that problem. The management of our company has definitely decided that we are going to make every industry, whether it has been there a long or short time, obtain the same advantages at the same costs; and so there will be one uniform set of terms.

[fol. 89] We consider the National Bonded Warehouse Company a new industry on our tracks. If there had been simply a change of tenants, we would consider that it would be entirely proper for the new tenant to assume the cost of maintenance. We are under no obligation to maintain the tracks that we have heretofore maintained at our expense, except to people who were occupying them before the end of government control; and whenever there is a change either in ownership or as tenants, we feel that it is only proper that this expense should be assumed by the new owner or the new tenant.

Cross-examination:

We have approximately 1,050 industrial tracks on our system. I could not say how many of these have signed these contracts, except to say that every one that has been constructed, or wherever there has been a change of ownership since March 1920, they have signed these contracts, and I think on the system as a whole there have been about seventy odd industries located since the end of government control. More than fifty per cent of the entire number of industrial tracks have been or were constructed, and are being used, without a contract.

If there had been no change in the name of this firm, or the style of the firm, or the character of business, we would have continued to handle Mr. Monroe's business for him without requiring him to sign the contract, that is until the time comes when we determine just how we can proceed to settle these old cases, which may not be very far off.

If an individual changes his name to a corporation, incorporates his name, we would consider him a new industry.

As to whether it might be the same industry, the ownership nor name, being changed, we would present him with a contract is a point that never came up until today. It is my understanding, when this maatter was presented to me, that the National Bonded Warehouse Company was a new concern, and it was never mentioned by any one that they were the same people that were previously operating on that track under the name of the Dixie Paper & Box Company.

The real intention of the railroad is to demand contracts where there is a change in the people doing business. It might be an old [fol. 90] industry going out of business and a new industry going into business.

In a change of ownership, though there had been previous service on the same industrial track, to a former owner, who has sold to another, I think it would be entirely proper to require the new owners to sign our standard contract and assume the expense of maintenance; that is the instruction we have issued to our people, and is the policy we are going to follow as far as it is possible for us to do so.

A new industry ought to bear all the expense of maintaining the property; they are benefitted to this extent, that they are not assuming any part of the cost of reimbursing the railroad for any part of the cost of construction of the track, that is where industries are located on tracks that have been put in at the expense of the railroad company, they are benefitted over new concerns coming in. I don't know how we may consider that when we go to those located on those old tracks requiring them to pay something to cover the cost of building the track as well as assuming the maintenance.

I don't know that any demand has been made on the National Bonded Warehouse Company for expense money; our way of getting at that is to present them with a contract; then that is used as instructions to the section foreman and Division Engineers how to make the charge; we would not know who to make the charge against, how to make the charge, unless they would agree to assume the expense.

In that contract the release from or the assumption of risk for damages by the man who signs the contract, the industry, is a very important consideration, it is an important factor. The thing that I have in mind is to get rid of an expense that the railroads ought not to bear, and that is of constructing and maintaining industry tracks.

The railroads have paid out large sums in one or two instances in Nashville, as damages from fire of plants, when we did not feel we were responsible for the origin of the fire.

We want protection against claims of that character and against the negligence of the employes of the industry in case our property should be damaged or employes should be injured through their [fol. 91] carelessness.

On the track which served the National Bonded Warehouse Company the bank is too high for them to load and unload from a road,

if a road were there. The bank could be cut down. A road could not be put there because there is not room enough between the tracks there to locate a highway. On the other side there wouldn't be space between the side track and the Bonded Warehouse Company's building. There was room to drive over the property of the Warehouse Company, the vacant ground, and get up alongside that track, but it has never been assigned for use as a public team track; it is physically possible.

Industries that were already doing business on old tracks are still being served. I do not consider that a discrimination against the National Bonded Warehouse Company.

Out of these 972 industries I suppose we are still maintaining probably more than 50 per cent, maintaining the track entirely at our expense, and the industry assumed no cost of construction; the remainder of the 972 were constructed under the former form of contract, providing for division of expense of construction as well as maintenance. As to how many of the 972 are bearing part of the cost of maintenance, I couldn't say.

My understanding of the word "discrimination" is that we should not give one industry more favorable conditions than another, but I do not think that the fact that we found it necessary to change our policy and set up an entirely different policy for new industries locating on our line, different from that pursued with reference to industries that have previously been located under a different policy, could be considered as discriminating, although as a practical proposition the old concerns would be enjoying some advantages the new concerns did not.

Redirect examination:

There is no public road or highway that leads to this industrial siding serving the Bonded Warehouse Company, the front end of its building faces Marietta Street, a public highway in Atlanta, and the back end is on the right of way of the Western & Atlantic Railroad. Just beyond that one of the tracks of the Southern Railway. There is no possible way to get in and out except over the property [fol. 92] of the Bonded Warehouse Company.

Recross:

The City might condemn a street through somebody's warehouse on to one of our tracks, but that does not mean we would be compelled to designate that track as a public delivery team track.

Examination of same witness by Chairman of the Commission:

We started the contract enforcement immediately following the end of government control, and up to this time have succeeded in getting about 72 to sign, which is about the number of new industries that have located or changed hands on our entire system since that time.

Redirect:

New industries that have located have signed. Some were located on existing tracks that had previously been constructed and maintained at our expense and they have signed up the new contract taking over the maintenance expense.

As to those which have been there for years and the ownership of which has not changed, we have not gotten yet to asking them to adopt our new contract, but we are going to get to it.

It would be harder to get an old one to sign that is already located, than a new one; naturally a good many of the old ones would object. Our new contract does not carry a traffic clause obligating the shipper to favor our line with any part of his competitive traffic.

For the Complainant

T. J. Monroe testified:

I personally bought this building at 1000 Marietta Street in 1916 and operated the Monroe Paper Company and the Dixie Paper & Box Company for several years there. I had a fire that destroyed part of the building and we rebuilt it considerably larger than it was before and decided to run there a warehouse business in addition to our paper business, and are operating both to-day. About April 1922, we took up with the railroad to have our siding raised a little, it being half way between the first and second floors, and they [fol. 93] agreed to do it if we would pay the cost of it and they brought the contract down which I have here. It cost $225.00 which we were willing to pay, but we would not sign the contract which they had attached to it, and Mr. Schmid said: "Well, there are certain parts of this contract that we will eliminate if it becomes necessary," the part I have crossed right here, it says: "The said railway company hereby reserves the right, and it is fully authorized whenever and at any time it shall deem necessary for any reason whatsoever, and without let or hindrance from the said industry, to take up and remove all track material from said track." He said he would have that eliminated if we would sign the contract, but we wouldn't even do that. So we took it up with Mr. Wilson, the Commercial Agent, and asked him to give us some help on this thing, to see if we couldn't get it settled up. He took it up with Mr. Baldwin, and he has his letter that on account of some changes in the Marietta Street bridge, they did not want to make any changes in the siding at this time, and so soon as this bridge was filed they wanted to put in a new lead, or a whole new track, as this siding was very dangerous, the cars might fall off on the main line, and they wanted to fix the whole thing while they were fixing it.

The next thing that came up I think was that Bragg & Milsaps wanted to put up a building there next to my lot and Mr. Baldwin was asked to attend several meetings, and never answered the letters or anything, so they took it up in Chattanooga, and finally got Mr. Trabue down here to try to solve this trouble, and during the conversation, which was three cornered between the railroad, Bragg &

Milsaps and myself, Trabue told Bragg & Milsaps that they could go on and appeal this to the Railroad Commission if they wanted to, that they might not be represented, and the Railroad Commission could order them to put in this siding, fix it up in proper condition, and that they would appeal to the Supreme Court, and that they would be tied up two years without a siding, and in the meantime it would cost them a great deal more than it would cost them to go ahead and fix this siding at this time.

They have presented me with two contracts, different forms, or [fol. 94] at least different charges to me. The first time Mr. Schmid brought a contract out, he said if we would sign this contract, I mean this is since Bragg & Milsaps got in it, this was along the first of the year, the railroad would put in our new track free, but they could not afford to put in Bragg & Milsaps because they are a new concern, but being we were an old concern, they would put ours in free of charge. I told him I did not want to sign it even on that, and he said for me to think it over, which I did for a good while and agreed to sign it on that consideration. Then he said the railroad will not do it now. So the next proposition came up with Mr. Delph, Chief Clerk to Mr. Baldwin, and he said that Mr. Trabue said for them to fix it up with me with the understanding they would put in the new track if we would excavate all that hill back there. We told him we would let him know about that, and we finally agreed to it, and Delph said the railroad had changed its mind and would not do that now.

Last week they came out and Delph said "We will go on and put you down a new track if you will do the excavating." I told him he had made that proposition once and I accepted it and the railroad turned it down and I did not know how to deal with them and did not care to discuss it any more, because they had already cut off our service and the Railroad Commission had it up; let's wait and see what they were going to do about it.

When they put in the Bragg & Milsap- track they cut off about 75 feet of my siding entirely on the 300 feet back, they cut off 75 feet from my vacant lot and threw it over 15 or 20 feet out of the way and in doing that made it very dangerous to put cars there, and they have contended with a number of people that the reason they did not give us service is because the track is in a dangerous condition; what the real cause is I don't know except to get us to sign the contract, and then make us stand an expense estimated at about $1,000.00 to put in a new track; we are satisfied with the track we now have. We have checked this past week and on account of their not giving us service we have had to haul or dray to our warehouse nine cars, of approximately 700,000 pounds and are still having to haul them; from the N. C. & St. L. siding and sidings of other railroads.

[fol. 95] I had no notice of the building of the Bragg & Milsaps track, they went there at 5 o'clock in the morning and when I arrived at 8:30 I saw about 200 men at work, who said they were moving the track over and they then had it about finished. They have taken up about 75 feet of my side track on that property, unless

we get it restored it will certainly reduce the value of this property, because I bought it for the side track service that I have always enjoyed. They removed not only 75 feet, but they removed the balance of it that went up on Bragg & Milsaps' lot.

Cross-examination:

The Bonded Warehouse Company was incorporated May 17th, 1922. The Dixie Paper & Box Company was incorporated about 1913. The title to the land on which the building stands and the vacant lot is vested in the Warehouse Company. The Dixie Paper & Box Company got service for a number of years but since May 1922 has not made any request for a siding or for switching service.

The building has a number of signs on it; it has J. C. Dyson, National Bonded Warehouse Company, T. J. Monroe Paper Company, Atlanta Nash Company; a number of different concerns are doing business in that building. They are all separate corporations and all pay the Bonded Warehouse Company for the privilege of doing business there. Their right to do business there depends upon the pleasure and is subject to conditions imposed by the Warehouse Company. The track, the 75 feet, which I referred to as being taken up was not on my property or that of the Bonded Warehouse Company. We did not pay a cent toward its construction or maintenance. I said it was our track because it supplied our lot there, and we unloaded cars there for a number of years, and the people we bought it from contended that they helped put it down.

We unloaded on the vacant lot too, possibly we would have five or six cars in, and we couldn't put them all just on the part of the track adjoining the building, and we would have to go up on the vacant lot, which was why we bought the vacant lot.

[fol. 96] The contract submitted to me on May 15th, 1922 involved the change I had requested of raising the track. Before the work had been done the engineer made us desposit a certified check for $225.00, which he estimated would be the cost, and said that as soon as the cross ties and rails were put down, a statement would be furnished to cover the cost $225.00 being an estimate.

The second contract, submitted to me in the spring of 1923 did not involve the question of raising the track above its present level. The 1923 estimated cost of lowering the side track 245 feet, the length of the National Bonded Warehouse, was $176.00 that does not include excavating, all of that we would have to pay for. The difference in the two contracts was that the former had in mind raising the present level or, rather, lowering it. The reason the former was dropped, or at least they quit negotiating it, was on account of the letter from Mr. Wilson, that the railroad was going to make changes and didn't want to raise that side track, that it was going to put in a new lead there. There was nothing in the letter about the danger of cars falling over on the tracks. I was not quoting the letter, but quoting Mr. Wilson. The last contract estimate was only for cross ties and labor, then the contract says: "This figure embraces the cost of cross-ties, labor, etc., and does

not take into account the question of grading, which I understand you desire to do with your own force." Mr. Delph estimated the cost for me at between $500.00 and $700.00. I stated that Mr. Edmondson told Mr. Dyson, one of the people doing business in our place, that the reason they were not giving service was because the track was in a dangerous condition. Mr. Edmondson is the man who traces the railroad's cars or has charge of that, I believe. I was not present and am just reporting what Mr. Dyson told me. The nine cars we had come in in the last week, came into Atlanta, some over the Georgia Railroad, some over the A. B. & A., some over the Central of Georgia and some over the N. C. & St. L. Ry.

The provision Mr. Schmid said would be eliminated from the contract was just that one about tearing out. He didn't say to me that to get the matter disposed of, he would recommend to the man-[fol. 97] agement that they vary from their policy, that he was not authorized to make the promise but would simply make the recommendation; he said to me, they would do it. I am absolutely positive about that, and also Mr. Delph came by with another statement last week and said they would waive this $176.00 cost if we would do the excavating they would put in this new track at $176.00 cost.

While the corporation has been formed, the owners of the track are the same: I own corporation, except that a couple of parties have got one share of stock in it just to make a corporation, there is really no change in the ownership; and the industry is the same as it has been all the time, except that we are still doing a paper business, but we are doing a warehouse business in connection with it.

For eight years I have been doing a paper business but not a warehouse business. We have been doing a warehouse business, I organized the National Bonded Warehouse Company, got a charter for that about April 1922. Prior to that I did a paper business exclusively; we did some storing, too, for the government during the war.

The Dixie Paper & Box Company is still doing business there and I am the owner of that.

J. C. Dyson testified:

I had three cars coming in since the N. C. & St. L. Ry. discontinued service on the track in front of the National Bonded Warehouse Company, and I took it up with the railroad representatives, and they said it was dangerous to run an engine in there, that it was liable to turn over; I believe they said from a crooked rail or something like that.

Cross-examination:

I am in the wholesale flour and feed business and have an office and space in the National Bonded Warehouse. I pay them office and storage rent. I had to dray three carloads which came in, one by the N. C. & St. L. and two by other roads. Mr. Edmondson, in Mr. Wilson's office was the person who told me the engine was liable

to turn over in there, and had a suit on their hands or something to [fol. 98] that effect: a switching crew told me the same thing.

J. W. Milsaps testified:

We are building close to the National Bonded Warehouse Company. We signed the contract. The way I came to sign it was I had to have a place to do business, I couldn't wait on the Commission or anybody else to decide, I had to decide myself. There was some things in it I didn't want to sign, but I was out of a home and had to have a place to do business or quit business. I got notice from the Railroad Commission, about it being postponed for thirty days, and I then wrote to Mr. Baldwin and Mr. Trabue, and we had a meeting at Mr. Monroe's place and I signed. I had to have the track. After Mr. Trabue explained it to me and everything I felt a little more kindly towards it than I did before; and Mr. Monroe also had one from the Central, and there was very little difference. He had signed the one from the Central, or agreed to. Mr. Trabue said if it went on to Court, it might go to the United States Court, and it might be something like two years, there was something said about that.

Cross-examination:

Mr. Trabue wasn't offensive and disagreeable to me, everything was nice and friendly with us.

The railroad didn't threaten and force me into doing something that I didn't want to do; to make me sign an unfair contract, that is not true.

R. L. Schmid recalled:

I did not promise Mr. Monroe, as an official of the Warehouse Company, or state to him, that the railroad company would vary the terms of its warehouse contract. I can't remember the exact words, but that I told him we would do thus and so is preposterous, because I could not do so. I have no authority, and would only be making a laughing stock of myself if I attempted to say such things, and afterwards be reversed, which I unquestionably would be. I went to Mr. Monroe's office with Mr. Delph, the Superintendent's Chief Clerk. The matter had been laying on the table and passed back and [fol. 99] forth for a year and I naturally like to clean up such things and clear my desk, and I understood he wanted this track lowered, so I went to him with this proposition: if I recommend to my people that they lower the track at their expense, would he sign the contract. On three different occasions I exphasized the fact that this was only my personal proposition; if he would agree to sign on those terms to let me know and I would then present it to the proper officials of the railway to se- whether or not they would approve it, and I said: "They have turned me down before on this kind of thing, and they may do it again." He did not accept the proposition and consequently I never submitted the matter to my people.

J. A. BALDWIN recalled:

Neither Mr. Schmid nor any subordinate under me, has any right or power to vary the provisions of our standard form of contract. I have never said to him that he might do so with reference to this particular Warehouse Company. I have never heard of the matter of giving special concessions to the Warehouse Company. Mr. Bruce, the General Manager, the chief operating officer of the railroad, has advised me that there should be absolutely no variation from the standard form.

[fol. 100] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER SETTLING STATEMENT OF EVIDENCE

We agree that the above and foregoing statement of the evidence in condensed form, under Equity Rule No. 75, in the case therein first above stated, is a true and sufficient statement of such evidence, under said Rule, and that the same may be approved by the Judge of the United States District Court for the Northern District of Georgia, in conformity to said rule, to be included in the record of the cause on appeal to the Supreme Court of the United States.

This 1 day of October, 1923.

Fitzgerald Hall, Tye, Peeples & Tye, Solicitors and Counsel for Complainant. W. E. Watkins, Solicitor and Counsel for Defendants.

The above statement of evidence, under Equity Rule No. 75 having been presented to me and the same having been agreed to by counsel for the respective parties to the cause, the same is hereby approved—Let the same be filed and become part of the record for the purpose of the appeal in the cause.

This 2d day of October, 1923.

Sam'l H. Sibley, Judge U. S. District Court, Northern District of Georgia.

[fol. 101] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION

[Title omitted]

MEMORANDUM OPINION, SIBLEY, J.—Filed Sept. 13, 1923

It appears that there are such differences in the terms on which industrial side tracks have been constructed and are maintained and used along the Western & Atlantic Railroad in this State as to

amount to discriminations, and that these differences might well be removed by regulation which the Georgia Public Service Commission appears to have power to make under the provisions of Georgia Code 2664. Reading the order of the Commission here attacked in the light of the correspondence which preceded it, as set forth in the bill, we construe it rather as an effort to enforce General Order 14 of the Commission, which prohibits the discontinuance of any service by a railroad without the permission of the Commission, than as a determination of the merits of the question as to what terms may and should be imposed touching the maintenance and use of the track here in controversy. General Order 14 is, in its terms, broad enough to include the service involved in delivering cars upon industrial side tracks. It was passed after Code 2664 gave the Commission jurisdiction over the use of side tracks and notwithstanding the general scope of its language, it applies here. We think that the General Order so applied is valid and enforceable and justifies the special order here attacked. We do not think the Railroad Company is cut off from applying to the Commission to fix or approve the terms on which this track may be used, or in default be discontinued, or from applying for general regulation of the entire subject if that is thought more desirable.

An interlocutory injunction of the Order of August 17th, 1923 [fol. 102] thus construed will be refused without prejudice to the making of the application indicated.

This September 13th, 1923.

Sam'l H. Sibley, U. S. Judge.

[File endorsement omitted.]

[fol. 103] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION

[Title omitted]

JUDGMENT—Filed Sept. 13, 1923

This cause coming on for hearing upon a motion for an interlocutory injunction before a special tribunal composed of Honorable Nathan P. Bryan, United States Circuit Judge, Honorable Robert T. Ervin, United States District Judge and Honorable Samuel H. Sibley, United States District Judge; after hearing evidence and argument thereon, it is considered and ordered, for the reasons stated in an opinion filed herewith, that an interlocutory injunction be and is hereby refused, without prejudice to the right of the Western & Atlantic Railroad to apply to the Georgia Public Service Commission for the fixing or approval of the terms on which the track

mentioned in the petition may be used or in default discontinued, or for other relief in the premises.

This September 13th, 1923.

N. P. Bryan, United States Circuit Judge. Robert T. Erwin, United States District Judge. Sam'l H. Sibley, United States District Judge.

[File endorsement omitted.]

[fol. 104] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed Sept. 25, 1923

To the Honorable Samuel H. Sibley, District Judge:

The above named Western & Atlantic Railroad, feeling aggrieved by the order and decree rendered and entered in the above entitled cause on the 13th day of September, A. D. 1923, does hereby appeal therefrom to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and it prays that this its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record and proceedings and papers upon which said order and decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such Court in such cases made and provided.

And your petitioner prays that the proper order relating to the security to be required of it be made.

Western & Atlantic Railroad, By Fitzgerald Hall, Henry C. Peeples, Solicitors and Counsel for Complainant and Appellant, Western & Atlantic Railroad.

[File endorsement omitted.]

[fol. 105] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Sept. 25, 1923

On motion of Henry C. Peeples, Esq., Solicitor and Counsel for Complainant, it is hereby ordered that an appeal to the Supreme Court of the United States from the order and decree heretofore, on September 13th A. D. 1923, entered and filed herein, be, and the same is, hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States,

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars.

This 25 day of Sept., 1923.

Sam'l H. Sibley, Judge U. S. District Court.

[File endorsement omitted.]

[fol. 106] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS ON APPEAL—Filed Sept. 25, 1923

Now comes the Complainant in the above entitled cause and files the following assignment of errors upon which it will rely in its prosecution of the appeal in said cause from the order and decree made by this Honorable Court on the 13th day of September, A. D. 1923.

I. Error is assigned upon said order and decree because the Court erred in refusing an injunction pendente lite, complainant and appellant insisting that under the law and the evidence in the cause such injunction should have been granted.

II. Error is assigned upon said order and decree because said order and decree being based, as stated by the Court therein, upon the reasons stated in the opinion filed with said order and decree, the reasons so stated were insufficient to sustain said order and decree.

III. Error is assigned upon said order and decree because the Court erred in refusing an interlocutory injunction as prayed, the order of the Georgia Public Service Commission, attacked by the petition of complainant, being null and void because obedience thereto would necessitate and result in a violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act.

IV. Error is assigned upon said order and decree because the statement in said opinion that "these differences" (the differences in the terms on which industrial side tracks have been constructed [fol. 107] and are maintained and used along the Western & Atlantic Railroad in this State) "might well be removed by regulation which the Georgia Public Service Commission appears to have power to make under the provisions of Georgia Code 2664", was and is erroneous, because the Georgia Public Service Commission, under the provisions of said Section 2664, has no power to pass any general order or rule for the construction, maintenance and use of such industrial side tracks. Said Section 2664 gives the Commission the power to make special orders with reference to industrial sidings, but only after hearing and then subject to such terms and conditions as the facts as disclosed by the evidence in the particular case may warrant.

V. Error is assigned upon said order and decree, because the statement in said opinion that "Reading the order of the Commission here attacked in the light of the correspondence which preceded it, as set forth in the bill, we construe it rather as an effort to enforce General Order 14 of the Commission, which prohibits the discontinuance of any service by a railroad without the permission of the Commission, than as a determination of the merits of the question as to what terms may and should be imposed touching the maintenance and use of the track in controversy" was and is erroneous, in that:

(*a*) The order of the Commission, attacked by the petition of complainant in said cause was not, in the light of the correspondence which preceded it, an effort to enforce General Order No. 14 of the Commission, but was a peremptory order for immediate restoration of side track service to the National Bonded Warehouse Company, after it had been shown to said Commission, in the hearing had before it with reference to the matter, that whatever service had been accorded to the National Bonded Warehouse Company by the Western & Atlantic Railroad, had been merely provisional, and its continuance based upon the signature of said Warehouse Company, demanded by the railroad company, to the standard form of [fol. 108] contract of the latter company, which signature having been finally refused, the railroad company discontinued such provisional and conditional service.

(*b*) Because said order of the Commission, attacked by the petition of complainant in said cause, was, as appears from the correspondence, and from the pleadings and evidence before said Commission and the said order of the Commission, not an effort to enforce General Order 14, but a peremptory order to give service upon said industrial track to the National Bonded Warehouse Company, without a determination by said Commission as to whether such service had been previously given to said Warehouse Company within the true intent and meaning of said General Order No. 14.

(*c*) Because said General Order 14, in so far as it requires the consent of the said Commission before discontinuance of any facilities, privileges or service previously given to any person or corporation, giving such person or corporation more of the privileges, facilities or service "to which they are entitled by law", was and is wholly void, since said Commission had and has no power to require that its consent be given before the withdrawal of any facility, privilege or service giving to any person or corporation more privileges, facilities or service than they are entitled to by law.

(*d*) Because continuance of the service by the Western & Atlantic Railroad to the National Bonded Warehouse Company, would give to the latter more service than it is entitled to by law, in that it would be violative of Sections 2 and 3 of the Interstate Commerce Act and the amendment thereto, known as the Elkins Act.

VI. Error is assigned upon said order and decree because the statement in said opinion that "General Order 14 is, in its terms, broad enough to include the service involved in delivering cars upon industrial side tracks. It was passed after Code 2664 gave the Commission jurisdiction over the use of side tracks and notwithstanding the general scope of its language, it applies here. We think [fol. 109] that the General Order so applied is valid and enforceable and justifies the special order here attacked" is erroneous as a basis for denial of the interlocutory injunction sought, in that:

(*a*) Said General Order 14 is itself void and it was not within the power of said Commission to make the same, not being within the authority given to the Commission by said Section 2664, as it is a General Order undertaking to regulate and control the maintenance and use of industrial tracks, instead of an order as to a particular industrial track, made after hearing as to whether or not conditions were such, under the law, as to require such track to be maintained or used, and upon what terms such maintenance or use should be required or allowed.

(*b*) Because said General Order 14, inasmuch as it requires previous consent of said Commission to the discontinuance of any facility, privilege or service, although such facility, privilege or service might be more than the person or corporation to whom the same had been given or extended was entitled to by law, was in itself null and void.

(*c*) Because said General Order 14 is not applicable to the instant cause in that it does not cover or provide for an order for restoration of service on an industrial track, where such service has been discontinued, inasmuch as authority to make a General Order with regard to such service was not given to said Commission by said Section 2664 and General Order 14 should be construed as applying only, and being intended to apply only, to what said Commission had the power to provide for by a General Order.

(*d*) Because said General Order 14, even if generally valid and enforceable and even if it applies to maintenance and use of industrial tracks, does not justify the special order attacked by the petition of complaint.

(1) Because said special order required the railroad company to restore a service, which restoration would require violation by complainant of Sections 2 and 3 of the Interstate Commerce Act and [fol. 110] Section 1 of the amendment thereto known as the Elkins Act, forbidding undue preference and discrimination by common carriers as between their patrons or shippers in interstate commerce.

(2) Because said special order imposed no terms upon the National Bonded Warehouse Company as to the maintenance or use of said industrial track, and requires service to be furnished on such track by the railroad company without any compensation whetever for the maintenance by it of such track or for service thereon, thus

taking the property of complainant without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

VII. Error is assigned upon said order and decree because it appears from the pleadings and evidence before the Court in said cause that the railroad company had tendered to the National Bonded Warehouse Company, a standard form of contract which said railroad company required and requires of all persons or corporations situated as was said Warehouse Company, before they can receive switching service on industrial sidings from said railroad company; that said standard form of contract had been signed by all persons and corporations, other than said Warehouse Company, situated as was said Warehouse Company, to whom switching service on industrial sidings was accorded by said railroad company; that it was the intention and purpose of said railroad company to require all persons or corporations receiving switching service on industrial sidings on its line of railroad to sign its standard form of contract, and it was dealing now with those of whom it had already made such requirement (including the National Bonded Warehouse Company), but as speedily as it could, with reasonable despatch, it would proceed to require the standard form of contract alike from all shippers and patrons having service on its industrial sidings; that the National Bonded Warehouse Company, after having been provisionally and temporarily accorded such service while the contract was under consideration by it, had finally refused to sign it; that it was necessary for the railroad company to have a standard policy and [fol. 111] standard contract as to industrial sidings, not only for economical and efficient administration of its operating department but also to avoid discrimination and violation of the Interstate Commerce Act and said Act as amended; and that the special order of the Commission, which was attacked in the petition of complainant, ordered sidetrack service to be restored to the said Warehouse Company, at once, without terms or conditions or contract of any sort, with no provision for the expense to the railroad company consequent thereupon, or for risk from fire, negligence of the industry, maintenance by the industry of necessary clearances of the like; that said special order was not within the power of said Commission, to observe it would require violation by complainant of the Acts of Congress hereinabove mentioned, and non-observance of such special order would subject complainant to the heavy burden of suits for penalties and possible prosecution of its agents and servants under Section 2667 of the Code of Georgia, set out in complainant's petition.

VIII. Error is assigned upon said order and decree because it appears from the pleadings and evidence in the cause that complainant, the Western & Atlantic Railroad, followed the procedure required and permitted by the law; that its action in discontinuing switching service for the National Bonded Warehouse Incorporated was essential to prevent a violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act, and that the order of the Georgia Public Service Commission dated August 31st, 1923,

required the doing of an illegal thing, namely, furnishing the National Bonded Warehouse, Incorporated, transportation service at less net cost than such service was furnished to others under similar circumstances and conditions, contrary to the provisions of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act.

Wherefore, the Ap-ellant prays that said order and decree be reversed and that said District Court of the United States for the North-
[fol. 112] ern District of Georgia, Northern Division, be ordered to enter a decree reversing the decision of the lower Court in said cause; and a decree granting to complainant an interlocutory injunction as prayed by it in its original petition in said cause.

Western & Atlantic Railroad. By Fitzgerald Hall, Henry C. Peeples, Its Solicitors and Counsel.

[File endorsement omitted.]

[fols. 113 & 114] Bond on Appeal for $500.00—Approved and filed Sept. 25, 1923; omitted in printing

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[fol. 115] In the District Court of the United States for the Northern District of Georgia, Northern Division

[Title omitted]

Præcipe for Transcript of the Record on Appeal—Filed Oct. 2, 1923

To O. C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, Northern Division:

Please prepare forthwith a certified transcript of the record in the above entitled cause for the appeal of complainant from the order and decree of the Court therein made and entered September 13th A. D. 1923, which record is to consist of the following:

1. The verified bill of complaint, with the affidavit attached thereto of W. P. Bruce, General Manager of complainant, together with Exhibits 1, 2, 3 and 4 to said bill of complaint.

2. Acknowledgement of service and waiver of further service by counsel for defendants.

3. Order of Hon. S. H. Sibley, Judge of said Court of September 4, 1923, setting the cause for hearing.

4. Notices to Hon. Clifford Walker, Governor of the State of Georgia, and Hon. George M. Napier, Attorney General of the State of Georgia.

5. The motion of defendants to dismiss the complaint.

6. The answer of defendants.

7. The evidence to be included in the record as prepared and stated by appellant or its counsel, lodged in your office at the time of filing the precipe, under Equity Rule No. 75 (b), together with the agreement of counsel and the approval of the Judge of said Court thereon.

[fol. 116] 8. The order and decree in the cause rendered and filed September 13th A. D. 1923, and the opinion of the Court filed therewith.

9. The petition of defendant for allowance of appeal from the last mentioned order and decree and the order of Court allowing the same and the assignment of errors filed therewith.

10. The citation on appeal and acknowledge of service thereof.

11. The appeal bond.

12. This precipe and the acknowledge by defendants' counsel of receipt of copy thereof and written agreement that it indicates and includes all the portions of the record necessary to be incorporated into the transcript of the record for complainant's appeal.

Fitzgerald Hall, Tye, Peeples & Tye, Solicitors and Counsel for Complainant and Appellant.

The defendants hereby acknowledge the receipt of a copy of the foregoing precipe, and agree that it indicates and includes all the portions of the record necessary to be incorporated into the transcript of complainant's appeal therein referred to.

This 1 day of October, 1923.

W. E. Watkins, Solicitor and Counsel for Defendants.

[File endorsement omitted.]

[fols. 117 & 118] [Title omitted]

Citation and Service omitted in printing.

[fol. 119] Due and Legal Service of the within citation is hereby acknowledged. Copy received. Further service and notice waived. Copy petition for appeal order allowing appeal and assignments of error also received and accepted.

This 25th day of Sept., 1923.

W. E. Watkins, Solicitor and Counsel for Defendants and Appellees.

Filed in Clerk's Office Sep. 25, 1923. O. C. Fuller, Clerk, By J. D. Steward, Deputy.

[fol. 120] UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

CLERK'S CERTIFICATE

I, Olin C. Fuller, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 120 pages of printing and writing contains a true copy of the record, assignments of error and all proceedings in the case of Western & Atlantic Railroad, Appellant, vs. Georgia Public Service Commission et al., Appellees, as specified in the Præcipe of Counsel therein as fully as the same remains of record and on file in the Clerk's office of the District Court of the United States for the Northern District of Georgia, Northern Division, at Atlanta, Georgia, except that the Original Citation with acknowledgement of service thereon is included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at Atlanta, Georgia, this 16th day of October A. D., 1923.

Olin C. Fuller, Clerk United States District Court, Northern District of Georgia. (Seal U. S. District Court, N. D. Georgia.)

Endorsed on cover: File No. 29,934. N. Georgia D. C. U. S. Term No. 624. Western & Atlantic Railroad, appellant, vs. Georgia Public Service Commission, Paul B. Trammell, James A. Perry, et al., &c., et al. Filed November 1st, 1923. File No. 29,934.

No. 209.

In the Supreme Court of the United States.

OCTOBER TERM, 1924.

WESTERN & ATLANTIC RAILROAD,
APPELLANT,

vs.

GEORGIA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE WESTERN & ATLANTIC RAILROAD.

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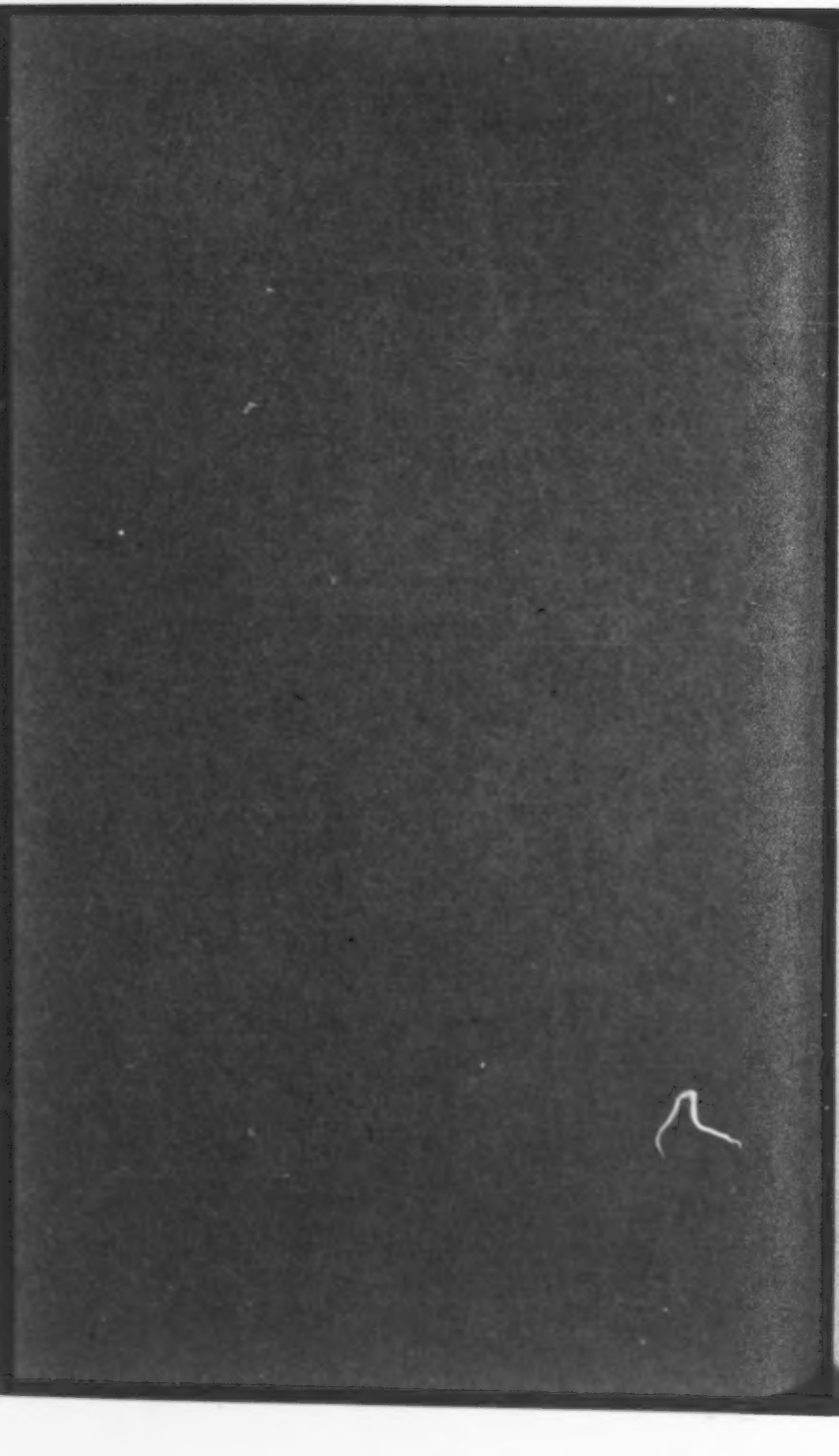
August 15, 1924.



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In the Supreme Court of the United States.

OCTOBER TERM, 1924.

WESTERN & ATLANTIC RAILROAD, APPELLANT,
versus
GEORGIA PUBLIC SERVICE COMMISSION, ET AL., APPELLEES.

No. 209.

BRIEF FOR THE WESTERN & ATLANTIC RAILROAD.

May it please the honorable Court:

The Western & Atlantic Railroad (hereinafter referred to as plaintiff), an interstate common carrier, filed a bill against the Georgia Public Service Commission, its personnel, officers and attorneys, to enjoin the enforcement of an order of said Commission requiring said railroad to furnish switching service on an industrial siding to the National Bonded Warehouse, Inc., of Atlanta, Georgia, without requiring that industry to pay anything for the cost of construction, maintenance and use thereof or to execute the railroad's standard industrial track contract or any contract whatsoever when (a) existing adequate public team tracks were conveniently located and (b) all other industries similarly circumstanced had been and were being required to make such payment and execute such a contract.

The suit was brought pursuant to Section 266 of the Judicial Code, and said order was attacked on the following grounds:

1. If said order should be obeyed, then the railroad would inevitably, as a matter of law, violate Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act (32 Stat. L., 847), because, by building, or reconstructing, maintaining and operating an industrial siding for the Warehouse Company without requiring it to pay anything therefor or to execute any kind of contract, the railroad would be unduly preferring this one industry over all others similarly circumstanced, thus giving it service and facilities not furnished others and enabling it to enjoy transportation at less "net cost" than all others. (R., 12-13.)

2. If the order should be obeyed the railroad would be forced to duplicate existing adequate facilities and furnish this one concern a special highly beneficial service—store-door delivery—at great expense without any compensation. Such a result would directly burden interstate commerce and take the railroad's property without due process of law. (R., 14.)

An order to show cause was granted. (R., 22.) Both a motion to dismiss and an answer were filed. (R., 24-28.) The case came on to be heard before three judges on the railroad's motion for an interlocutory injunction, which was refused, *without prejudice*, on the ground that the railroad should have first formally sought relief from the Georgia Commission itself (which in effect it had done.) (R., 56-57.) The railroad thereupon appealed directly to this Court. (R., 58.)

I.

STATEMENT OF THE CASE.

BILL OF COMPLAINT.

The Western & Atlantic Railroad is the statutory designation of The Nashville, Chattanooga & St. Louis Railway as lessee of the State of Georgia's road from Chattanooga, Tennessee, to Atlanta, Georgia. (R., 1.) It is operated as an integral part of said Railway's 1,250 miles of main line road in Tennessee, Kentucky, Alabama and Georgia. (R., 3.)

The Georgia Public Service Commission is a statutory body with various powers including (Section 2664 of 1910 Georgia Code) . . . "authority to prescribe rules with reference to spur tracks and side tracks, with reference to their use and construction, removal or change, with full power to compel service to be furnished to manufacturing plants, warehouses and similar places of business along the line of railroads, where practicable and in the judgment of the Commission the business is sufficient to justify and on such terms and conditions as the Commission may prescribe." (R., 1-2, 8-9.) Heavy penalties—*five thousand dollars per day*—are prescribed for a violation of the Commission's orders. (R., 9-10.)

The National Bonded Warehouse, Inc., was chartered under the laws of Georgia on May 17, 1922, and thereafter located along an old private industrial siding, which was in a more or less dilapidated condition, diverging from plaintiff's northbound main in the City of Atlanta. This old track was built many years ago by the railroad for the

convenience of industries then located thereon, and such is the lay of the land and location of the track that the public at large cannot possibly use it, but only those industries located thereon, which now are said Warehouse Company and J. K. Shippey. (R., 3.)

When the Warehouse was incorporated and moved into its present location in the late spring of 1922, that portion of said siding immediately in front of its property was in such condition as to require extensive rebuilding and repairs. The Warehouse was anxious for immediate service, so the Railway as an accommodation began at once to furnish switching service thereon *with the understanding that the Warehouse would in due course execute the standard side track contract for construction, maintenance and operation.* (R., 3-4.)

After considerable delay the Warehouse refused to execute said standard contract, so the Railway gave it notice that in about two weeks it would discontinue this industrial track service unless said contract was executed. Thereupon the defendant Commission, *without any hearing*, notified the Railroad not to discontinue service. To this notice the Railroad replied on August 9th in part as follows:

> "We will be prepared on twenty-four hours' notice to appear before your Commission. We hope very much, if you feel that the matter warrants an investigation, that you will have this hearing before the 15th of August." (R., 5.)
>
> . . . . . .
>
> "Our policy in this respect is uniform throughout the system. It is the outgrowth of many years of labor, study, litigation and legislation.

Would greatly appreciate further advice from you regarding the matter." (R., 5.)

To this the Commission, under date of August 10, 1923, replied that such service could not be discontinued, without application to the Commission, without violating the Commission's General Order No. 14. (R., 5.) Further correspondence finally resulted in the service by mail, August 17, 1923, upon the railroad of a Rule *Nisi*, directing the railroad to show cause before the Commission on August 28th why it should not be permanently required to restore "side track service to the National Bonded Warehouse Company." (R., 7.)

On the appointed day, August 28, 1923, a full hearing before said Commission was had (the pleadings and proceedings being a part of the record in this case—R., 33-56), and a brief was filed by the railroad on the morning of August 31st, and at 2:30 P.M. *the same day* the following order (which is the predicate of this action) was made:

"Atlanta, August 31, 1923.

"File 15777.

"In re Discontinuance of Sidetrack Service to the National Bonded Warehouse Company, Atlanta, Georgia, by Nashville, Chattanooga & St. Louis Railway.

"Upon consideration of the facts and the law in this case, it is

"Ordered: That, effective immediately on receipt of this order, the N., C. & St. L. Railway restore sidetrack service to the National Bonded Warehouse Company, Atlanta, Georgia.

"This August 31, 1923.

"By order of the Georgia Public Service Commission.

"(Signed) Paul B. Trammell, Chairman.

"(Signed) Albert Collier, Secretary." (R., 7.)

Two city blocks—1,600 feet—from the warehouse plaintiff maintained adequate public team tracks. (R., 8.)

"In the sixteen months during which the Warehouse Company has been located at the present site the total number of cars loaded and unloaded on this industrial siding by the Warehouse Company was 314, of which number approximately 85 per cent contained freight moving in interstate commerce. Of this number of cars, only 139 were handled by the Western & Atlantic Railroad and the Nashville, Chattanooga & St. Louis Railway, 85 per cent of which moved in interstate commerce, 175 of this number being handled by other railroad companies operating lines into and out of Atlanta.

"For placing loaded cars that come into Atlanta or other railroads on this industrial siding, plaintiff receives a switching charge of $2.50 per car, said charge not covering the actual out-of-pocket cost of service. For placing loaded cars that come into Atlanta on plaintiff's road no switching charge is made, although the cost of placing a car on said industrial siding is considerably more than the cost of placing the same car on the public team tracks.

"No charges are made for moving empty cars off the siding." (R., 8.)

The contract which plaintiff presented to the Warehouse Company was its standard form, which all industries similarly circumstanced were required

to and did actually execute. (R., 10.) The history of this contract and the reasons impelling its adoption are detailed in the bill (R., 10-12), concluding thus:

> "This was essential, *first*, because the increased cost of operating terminals made it necessary that industries enjoying these special services should bear a proportional part of the expense thereof; *second*, because from the administrative standpoint of the Railroad a standard policy and contract were the only practicable method of operating the hundreds of sidings all over the system, it being impossible to continue to properly operate with separate and different provisions covering the construction, maintenance and operation of the constantly increasing number of such sidings; and, *third*, through the absolute necessity, as a matter of law, of treating all industries under substantially similar circumstances and conditions in precisely the same manner.
>
> "At the present time the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway treat all new shippers and industries in the four States of Georgia, Alabama, Kentucky and Tennessee alike. There is no discrimination and no preference. Under similar circumstances and conditions each industry is treated precisely alike, this being essential, plaintiff is informed and believes, in order to comply with Sections 2 and 3 of the Interstate Commerce Act, the Elkins Act, and the various State laws inhibiting preferences and discriminations." (R., 12.)
>
> . . . . . .
>
> "The order of the Georgia Public Service Commission above quoted, if obeyed, would compel the Western & Atlantic Railroad to depart

from its fixed, fair, reasonable standard policy —a policy, as plaintiff is informed and believes, adopted by practically all the railroads in the United States—and discriminate against all other shippers, interstate and intrastate, in the States of Kentucky, Alabama, Tennessee and Georgia in favor of the National Bonded Warehouse, Inc., alone." (R., 12.)

If the Warehouse Company is entitled to such treatment so are all others similarly circumstanced, and such a condition would increase the railroad's maintenance expenses about $180,000.00 annually. (R. 13-14.)

Said order of August 31, 1923, (R., 7) is challenged on these grounds:

1. Obedience thereto impels disobedience and violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act. (R., 13.)

2. Obedience thereto would so increase the railroad's expenses as to directly burden interstate commerce and so require it to render expensive service without compensation as to constitute a taking of property without due process of law. (R., 13-14.)

The usual injunctive relief was prayed. (R., 15-16.)

MOTION TO DISMISS.

The substance of this motion was that the facts stated in the bill did not warrant equitable relief, and that, in any event, the Court had no jurisdiction until the Interstate Commerce Commission had acted. (R., 24.)

ANSWER.

The answer is largely devoted to a general denial with the affirmative averment that part of the building of the newly incorporated Warehouse Company has been in existence some time, and that the industrial track in controversy is a public and not a private track. (R., 25-28.)

THE EVIDENCE.

1. Many years ago the railroad constructed an industrial siding—not a public track—to serve the Palmer Brick Company, which is no longer in existence. (R., 42.)

The National Bonded Warehouse was incorporated May 17, 1922, and thereafter acquired a portion of the land served by the old Palmer Brick Company's private track. It was a new industry, not the reorganzation or consolidation of existing businesses. (R., 53.)

Thereupon the railroad submitted to the Warehouse Company its standard form of sidetrack contract—"precisely the same as the one we submit to other industries"—commencing at once, as an accommodation, to furnish switching service, but after protracted negotiations the industry refused to sign. Thereupon this service was discontinued. (R., 40-41.)

2. At the hearing August 28, 1923, before the Georgia Commission the railroad presented its views elaborately and fully in a formal answer (R., 33-38) and by evidence (R., 38-50), as did the complaining Warehouse Company. (R., 51-55.) The case was fully presented to the Commission when it made its

order of August 31, 1923, and was decided "upon consideration of the facts and the law in this case." (R., 23.)

3. Said order did not require the industry to pay anything toward the cost of construction, maintenance or operation of this industrial siding, nor did it require the industry to execute any contract of any kind or character. (R., 23.)

4. Three public team yards and fifteen switch engines are maintained by plaintiff in Atlanta; one of these, adequate in size and appointments, lies only 1,600 feet from the front door of the warehouse, connected by a paved city street. (R., 38, 41.)

5. This industrial track is not in fact a public track, nor, due to the physical situation, can any one save the two adjacent industries (the Warehouse Company and J. K. Shippey) get to it and use it. It is a private industrial track. (R., 38, 39, 47, 50.) No public highway or street or alley approaches it. (R., 50.)

6. There is nothing either in the volume or character of the Warehouse Company's business that differentiates it from hundreds of other shippers along the railroad's line. It is no more entitled to store-door delivery, without any cost to it and without executing a contract, than any other industry. (R., 39, 41, 47, 48.)

7. Industrial track service, or "store-door or plant delivery," is for the sole benefit of the industry, saving it drayage charges, but adding largely to the

railroad's operating and maintenance expenses, for which it receives no compensation. (R., 31, 47, 53.)

8. About eighty-five per cent of all the Warehouse Company's business is interstate. (R., 41.) The bulk of its business comes in over other roads. (R., 41.) For cars moving over the plaintiff's lines no charge is made for switching to said industrial siding. For cars coming in over other roads, and this is the greater portion, there is a switching charge of $2.50 per car, while the *actual cost of such switching service is $8.12 per car.* (R., 30-31, 46.)

9. Although the Warehouse Company's line had business largely over other roads (R., 41) it refuses to execute the usual and fair industrial siding contract with plaintiff railroad, though its principal owner *did execute a similar contract with the Central of Georgia Railroad Company.* (R., 55.)

10. The railroad's land thus being used without compensation is worth $1,509.00; it will cost over $400.00 to put the track in proper operating condition (R., 40); it will cost at least $43.00 per year to maintain it; it will cost the railroad $8.12 per car to operate it, for which it receives no compensation except for cars arriving over other lines, and then only $2.50 per car. (R., 30-31, 38-39, 46-47.)

11. For nearly seventy years plaintiff railroad, as most others, constructed, maintained and operated industrial sidings without any fixed policy, preferring some, discriminating against some. There was a compelete lack of uniformity. (R., 30, 42-45.)

12. As the number of industries increased, the terrific cost to the carriers, the impossibility of adequate administration and supervision, and the recent laws against discriminations and preferences made a change—and a change to a fixed, fair, uniform policy—absolutely necessary. (R., 30-32, 38, 47.)

13. To change the practice of seventy years—to establish and enforce a standard where there had been no semblance of uniformity—to put all on the same basis is a stupendous undertaking; cannot be done at once; a beginning must be made somewhere, sometime. (R., 43, 44, 48.)

14. Before Federal control plaintiff had made some progress. (R., 30-31.) The United States Railroad Administration found uniformity essential. (R., 19-21, 31.) Since Federal control, every new industry moving onto an existing track or desiring a new track has been required to sign the same uniform standard contract. There has been no change; no exception; *all have been treated exactly alike;* one hundred and seventy-four have signed—only the Warehouse Company has refused. (R., 32-33, 39, 41, 44, 47, 51, 55.)

15. There is not involved in this case the reasonableness of any or all of the terms of said standard contract. None of them was challenged. Approval of the substance of the contract is not asked—only approval of the principle of having and enforcing a standard. The only issue is whether this one industry, newly located on plaintiff's lines, is entitled to more favorable treatment than all others similarly circumstanced, so that it will receive transportation

at less "net cost" than all others, and whether the State of Georgia has the power to compel such preferential treatment (R., 43-45) in the face of an effort by the plaintiff railroad to put all industries on precisely the same basis.

To put it another way—can an interstate carrier standardize its service so as to insure equality of treatment to all similarly circumstanced, or does the fact that it cannot simultaneously—at one fell stroke—remove all existing discriminations, the accretions of seventy years, render impossible an orderly effort to require each in turn to accept the standard?

PROCEEDINGS IN THE DISTRICT COURT.

The District Court refused an interlocutory injunction—expressing no opinion on the merits of the case—on the ground that General Order 14 of the Georgia Commission required the Railway to petition it for authority to stop the temporary service furnished the Warehouse Company with the expectation that it would in due course execute the usual standard contract. (R., 56-58.)

Appeal was thereupon perfected directly to this Court. (R., 58.)

II.

SPECIFICATIONS OF ERROR.

1.

The District Court erred in refusing to grant an interlocutory injunction to restrain the enforcement of the order of the Georgia Commission of August 31, 1923, because said order, as a matter of law, was void in that obedience thereto necessitated a disobedience and violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act, the Federal laws being applicable and paramount.

2.

The District Court erred in holding that *as a matter of procedure* the Georgia Commission's General Order 14 necessitated a formal petition to that Commission as a condition precedent to the Court's right and power to consider the merits of the bill because

(a) General Order 14, properly construed, has no application to industrial sidings.

(b) General Order 14, if applicable to industrial sidings, is void because the Georgia Statutes* from which said Commission gets all of its authority vests the Commission with no power to make general orders operating in futuro in such a case.

(c) The order of the Georgia Commission under attack was not predicated on General Order 14.

* These are reproduced in the Appendix, page 36 infra.

(d) A full and complete hearing was in fact had and the Georgia Commission has rendered a decision on the merits.

(e) There is no requirement of law or comity that requires an interstate carrier to ask the Georgia Commission's permission to obey an applicable and controlling Federal statute.

3.

The District Court erred in ordering the plaintiff to switch on a private industrial siding without requiring the industry to pay anything toward the cost of construction, maintenance and operation of said track and without any contract of any kind because such large, uncompensated and unnecessary expenditure by the plaintiff was a direct burden upon interestate commerce and took plaintiff's property without due process of law.

III.

BRIEF OF ARGUMENT.

Plaintiff is seeking by its bill of complaint to enforce its rights, as it conceives them, in two respects:

(a) To remedy the discriminations and preferences that have grown up in three-quarters of a century of operation and to prevent such discriminations in the future by adopting a fair industrial track policy and making it of universal application.

(b) To require industries to bear a fair proportion of the total expense of the special service of switching to and from industrial sidings—furnishing store-door delivery.

The first obstacle toward the consummation of this plan was the refusal of the Warehouse Company to do what one hundred and seventy-four similar industries have done since Federal control began; this refusal being sustained by the order of the Georgia Commission, the alleged invalidity of which is the predicate of plaintiff's bill of complaint.

JURISDICTION.

(a) Jurisdiction is acquired under Section 24 of the Judicial Code, the suit being of a civil nature arising under the Fourteenth Amendment to the Constitution of the United States and the Interstate Commerce Act and the Elkins Act.

(b) If the amount in controversy were material, the facts shown, page 11 supra, coupled with the

impending penalties, clearly show that over three thousand dollars, exclusive of interest and costs, is involved.

Western & Atlantic R. R. v. R. R. Commission of Ga., 43 S. C. R. 252.
Glenwood Light Co. v. Mutual Light Co., 239 U. S. 121, 125.
Shultis v. McDougal, 225 U. S. 561, 569.
Berryman v. Whitman College, 222 U. S. 334, 345.
Bitterman v. L. & N., 207 U. S., 205, 225.

(c) As the suit arises under a law regulating commerce between the States, the amount involved is immaterial.

Louisville & Nashville R. R. v. Rice, 247 U. S., 201.
Atlantic Coast Line v. R. R. Commission of Ga., 281 Fed., 321.
New York Central v. Mutual Orange, etc., 251 Fed., 230.
Wells, Fargo & Co. v. Cuneo, 241 Fed., 726.
Alabama Great Southern v. American Cotton Oil Co., 229 Fed., 11.
Smith v. A. T. & S. F. Ry., 210 Fed., 988.
McGon v. N. P. R., 204 Fed., 998.

(d) If the plaintiff obeys the challenged order of the Georgia Commission, it *ipso facto* violates Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act. If it disobeys said order it *ipso facto* subjects itself to the excessive fines and penalties provided for in Sections 2667, 2668 and 2669 of the 1910 Georgia Code. (R., 9-11.)

Thus between Scylla and Charybdis injunctive relief is the only adequate remedy.

Southern Railway v. Reid, 222 U.S., 424, 442.
Eastern Texas R. R. v. R. R. Commission, 242 Fed., 300, 304.

Damage threatened or imminent, irremediable at law, warrants a resort to equity.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S., 229, 256.
Rast v. Van Deman & Lewis, 204 U. S., 342, 355.

THE TRACK IN QUESTION IS A PRIVATE INDUSTRIAL SIDING, NOT A PUBLIC TRACK.

This track was built to serve one industry. (R., 42.) Now it serves two. It lies parallel to the plaintiff's two main lines, immediately beyond which on one side is the Southern Railway's tracks; on the other the private property of J. K. Shippey and the Warehouse Company. These two industries occupy the entire space between Marietta Street and the railroad tracks. No public street or alley leads to or approaches this track. The public does not use the track. The public, due to physical limitations, cannot use this track. (R., 38, 47, 50, 53—see also the maps and pictures exhibited to the bill of complaint at page 16 of the Record.) The public is not seeking to use this track—only this one private industry for its own private convenience.

In Georgia there is no law making such a track a public track or open to use by the public and subject to public control; nor does any statute contain "express provisions whereby it will retain its public

character and be open to use by other shippers" as in *Lake Erie & W. Co. v. State Commission*, 249 U. S. 422.

In point of fact, the location of the track in question is such that nobody but the Warehouse Company can use it—nobody else does use it—nobody else wants to use it.

The Warehouse Company made no effort to support by testimony the averment in its answer that this track was a public track—all it did was by cross examination to elicit the following from the plaintiff's General Manager:

> "The City might condemn a street through somebody's warehouse on to one of our tracks, but that does not mean we would be compelled to designate that track as a public delivery team track." (R., 50.)

Neither the City nor any other arm of the Government is interested or appeared or testified.

In *Harrold Bros. v. Mayor, etc., of Americus*, 142 Ga. 686, 83 S. E. 534, 536, the Supreme Court of Georgia said:

> "Of course, the construction of a spur track from the main line of a railroad company for the purpose of serving an individual enterprise only is not a public purpose."

In *Railroad Commission v. L. & N. R. R. Co.*, 148 Ga. 442, 96 S.E. 855, 857, the Supreme Court of Georgia, construing Section 2664 of the Georgia Code—the same section involved in the instant case—said:

> "Consequently the section must be construed with reference to this constitutional inhibition; and thus construed, the section empowers the commission to require a railroad company to construct spur tracks (1) when such construction is practicable, and the business to be derived by the railroad company shows the order to be reasonable, and (2) when the facts show that such track is a public track and constructed for the benefit of the public."

In the case at bar the public is not demanding the construction of this track. The mayor, the city council, representative citizens, did not appear. No body, civic or otherwise, is seeking this track except the one industry that it will serve. No others can use it. It cannot, therefore, be said to be "constructed for the benefit of the public."

Even if the proposed track "would be available incidentally for other things," it still is a private track. *Missouri Pacific v. Nebraska*, 217 U. S. 196, 206-7. In the instant case, however, due to physical conditions, no one else can use it at all.

Where there is no declaration by the State, legislative or judicial, that spur or industrial tracks are "public facilities," and where there is no demand therefor save by some interested party, and where existing facilities are adequate, there is no doubt but that such a track is a private one. *Union Lime Co. v. C. & N. W. R'y Co.*, 233 U. S. 211, 222.

"Verbal declarations cannot alter the facts." *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S., 498, 521.

THE GREAT OBJECT AND PURPOSE OF SECTIONS 2 AND 3 OF THE INTERSTATE COMMERCE ACT AND SECTION 1 OF THE ELKINS ACT WAS TO INSURE UNIFORMITY OF TREATMENT AS TO SERVICE AND FACILITIES AS WELL AS TO CHARGES.

Store or plant door delivery is a service that adds directly and immediately to the value of transportation. It saves the industry drayage and facilitates the handling of its business—incidentally adding to the carrier's expenses, but not to its revenues." (R., 37, 47.)

To furnish industrial sidings with the incident service *free of any charges* to some and not to others is obviously discriminatory. *Great Northern v. Minnesota*, 238 U. S. 340, 346. To require some to execute contracts and not to require others to do likewise is clearly inequitable. *All similarly circumstanced must be treated alike.* The Warehouse Company from a traffic standpoint is just like hundreds of other industries on the plaintiff's system. (R., 39, 41, 47, 48.)

Section 2 of the Interstate Commerce Act requires equality of charges; Section 3, equality of facilities and services; Section 1 of the Elkins Act forbids the giving to or receiving by an industry of *any kind of advantage whatsoever.*

In *United States v. Union Stock Yard & Transit Co.*, 226 U. S. 286, the Government filed a bill to enjoin alleged violations of Sections 2, 6 and 20 of the Interstate Commerce Act and Section 1 of the Elkins Act. This Court said:

> "This court has had frequent occasion to comment upon the purpose of Congress in the pas-

sage of these laws to require equal treatment of all shippers and to prohibit unjust discrimination in favor of any of them." (307.)

. . . . . .

"By Sec. 2 of the Act to Regulate Commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practiced." (307-8.)

. . . . . .

"It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the Commerce Court should have enjoined the carrying out of this contract." (309.)

In *Armour Packing Co. v. United States*, 209 U. S. 56, 71-72, the Packing Company was indicted for obtaining an alleged unlawful concession from the Burlington Road. In discussing the Elkins Act this Court said:

"And we find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to

reach all means and methods by which the unlawful preference or rebate, concession or discrimination is offered, granted, given or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the item includes anything which is a plan or contrivance. Webster defines it to be 'that which is devised or formed by design; a contrivance, an invention; a project,' etc." (71.)

. . . . . .

"The Elkins Act proceeded upon broad lines, and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published. (72.)

In *United States v. Metropolitan Lumber Co., et al.*, 254 Fed., 335, 341, certain lumber companies were indicted for alleged violations of the Elkins Act. In overruling demurrers to these indictments the Court said:

"It needs no argument to demonstrate that there is fully as much room for the exercise of

favoritism and resulting inequality in the granting or withholding of *transportation service or facilities* as there is in the matter of compensation to be paid for such service, for as was said by the Interstate Commerce Commission in the matter of *The New England Investigation*, 27 Interest. Com. Com'n R., 560, 616, 'service is often of even greater importance than the rate itself.' This is especially manifest when there exists an embargo, such as the indictments in these cases allege. Hence, bearing in mind that the purpose of Congress in passing the Elkins Act was to utterly eliminate every form or kind of discrimination, favoritism, and inequality, it is quite impossible to believe that when Congress used the broad and comprehensive language which it did, 'whereby any other advantage is given or discrimination is practiced,' it intended to cover only advantages or discriminations in the matter of rates or compensation for transportation service. If the discrimination in rates was the only evil aimed at, why were the words above quoted added? Discrimination in respect to rates had been as completely covered as the English language is capable of, by the use of the words 'whereby any such property shall by any device whatever be transported at a less rate,' etc." (Italics ours.)

Switching charges must be alike where the service is rendered under substantially similar circumstances and conditions, else there results a violation of Section 2 of the Interstate Commerce Act. *Seaboard Air Line v. United States*, 254 U. S. 57, 62.

Where a carrier having embargoed a given commodity nevertheless transports it for one particular shipper, it violates Section 3 of the Interstate Com-

merce Act. *United States v. Lehigh Valley R.*, 254 Fed., 332.

Where a lease by a carrier to shipper gave such shipper a benefit others did not enjoy, so that said shipper received transportation service at less net cost than did others similarly circumstanced, such action constituted a violation of Section 3 of the Interstate Commerce Act and Section 1 of the Elkins Act. *Central of Georgia v. Blount*, 238 Fed. 292.

Where a carrier in good faith contracted with one grain elevator, but no others, to pay $1.75 per car for all grain received by such elevator coming from stations on the carrier's lines, the legal result was unlawful discrimination. *Elwood Grain Co. v. St. Joseph & G. I. Ry.*, 202 Fed., 845.

For a carrier to extend credit to one shipper for a longer period than to others similarly circumstanced constitutes a violation of the Elkins Act. *Hocking Valley Ry. v. U. S.*, 210 Fed., 735, 740, 743.

To the same effect are:

Southern Ry. v. Prescott, 240 U. S. 632, 638-9.

Phillips v. Grand Trunk, 236 U. S. 662, 667.

Chicago & Alton v. Kirby, 225 U. S. 155, 165-6.

Union Pacific v. Updike Grain Co., 222 U. S. 215, 220.

New York, N. H. & H. v. I. C. C., 200 U. S. 361, 391-2.

Atlantic Coast Line v. Trammell, et al., 287 Fed., 741, 744-5.

TO FURNISH THE WAREHOUSE COMPANY SWITCHING SERVICE AS ORDERED BY THE GEORGIA COMMISSION ENABLES IT TO OBTAIN TRANSPORTATION SERVICE AT LESS NET COST THAN ITS COMPETITORS AND OTHER SHIPPERS SIMILARLY CIRCUMSTANCED, HENCE AMOUNTS TO AN UNDUE PREFERENCE.

In *Chesapeake & Ohio Ry. v. Standard Lumber Co.*, 174 Fed., 107, it was held that an agreement made in 1899, the effect of which was to give transporation service at less "net cost" to the Lumber Company than to others similarly situated, constituted an illegal discrimination and was void.

It is not customary to make additional charge for spotting cars on ordinary private spurs (*Lake Terminal Case*, 50 I. C. C., 489, 497; *In Re Car Spotting Charges*, 34 I. C. C., 609), hence to construct and maintain and then operate without any charges to one industry unduly prefers that industry and unduly discriminates against others similarly situated.

In *Iron Ore Rate Cases*, 41 I. C. C., 181, 200, the Interstate Commerce Commission said: "Obviously, it is discriminatory for carriers to place ore shipment for some shippers on private tracks within their plants at the points of unloading, while other shippers are served only at the gates of their plants or at the point of interchange with the industry tracks."

See also *Mitchell Coal & Coke Co. v. P. & R. R.*, 38 I. C. C., 40, 44.

Carey Mfg. Co. v. Director General, 59 I. C. C., 647.

In *Traffic Bureau of St. Louis v. C. B. & Q.*, 14 I. C. C., 317, the Commission said: "A railroad company by granting a privilege which, although ostensibly

open to the whole public, can, in the nature of things, only be taken advantage of by certain shippers, creates a discrimination which may or may not be undue, according to the circumstances in evidence."

See also *George N. Pierce Co. v. N. Y. C. & H. R.*, 19 I. C. C., 579.

Alan Wood Iron & Steel Co. v. P. R. R., 22 I. C. C., 540, 545.

Chicago, Wilmington & V. Coal Co. v. C. B. & Q., 23 I. C. C., 13.

Westport Stone Co. v. C. C. C. & St. L. Ry., 48 I. C. C., 637.

Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C., 259.

FEDERAL LAWS CONTROL.

Eighty-five per cent of all traffic on this industrial siding is interstate—compensation for its use directly and immediately affects the revenues of an interstate carrier. (R., 41.) "That the service is performed wholly in one State can make no difference if it is a part of interstate carriage." *United States v. Union Stock Yards*, 226 U. S., 286, 304.

Where the Federal statutes are applicable they control to the exclusion of any State laws. The *Minnesota Rate Cases*, 230 U. S., 352, 399-400; *Illinois Central v. Messina*, 240 U. S., 395.

PRELIMINARY RESORT TO THE INTERSTATE COMMERCE COMMISSION NOT NECESSARY.

The instant case does not involve the exercise of administrative discretion. It does not involve the wisdom or propriety or fairness of this or that provision of the plaintiff railroad's standard industrial

siding contract. It involves the naked question of whether as a matter of law the plaintiff has the right and power to adopt some reasonable contract for store-door service and then require all similarly circumstanced to execute it. We ask no approval of the particular provisions of the contract actually submitted to the Warehouse Co. (R., 42-45.)

The question involved being merely one of law upon undisputed facts, preliminary resort to the Interstate Commerce Commission was unnecessary.

Great Northern Ry. v. Merchants' Elevator Co., 259 U. S., 285, 294-6.

Pennsylvania R. R. v. Puritan Coal Co., 237 U. S., 121, 131-2.

TO REQUIRE THE RAILROAD TO CONSTRUCT, MAINTAIN AND OPERATE THIS INDUSTRIAL SIDING WITHOUT EITHER CONTRACT OR COMPENSATION IS A DIRECT BURDEN UPON INTERSTATE COMMERCE AND A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The plaintiff railroad has three public yards in Atlanta, one being only two blocks along Marietta Street from the Warehouse Company's front door. (R., 41.) This yard—near at hand—is entirely adequate to handle all the Warehouse Company's business. (R., 41.) It is conveniently located—nothing but actual plant-door service could exceed its convenience.

The Georgia Commission's order requires plaintiff, when it has already in existence adequate public facilities conveniently located, to reconstruct (this old track required repairs to make use of it safe. R., 38, 40), maintain and operate a private industrial siding for the sole convenience and benefit of the

Warehouse Company, *without any compensation therefor.*

Each class of railroad traffic should bear its proportionate part of the cost of transportation. *Northern Pacific Ry. v. North Dakota*, 236 U. S., 585, 596-7. This the Georgia Commission's order prevents, thereby imposing directly on interstate commerce as a whole the cost of this particular preferential service to this one private industry. Directly burdening interstate commerce by such an order or otherwise is contrary to law.

Minnesota Rate Cases, 230 U. S., 352, 396, 400.

Missouri et al. v. Kansas Natural Gas Co., 44 S. C., R. 544, 545.

So the taking of the carrier's property for the industry's sole use and requiring the duplication of existing adequate facilities offends the due process of law clause of the Fourteenth Amendment.

Missouri Pacific v. Nebraska, 164 U. S. 403, 414, 416-17.

Missouri Pacific v. Nebraska, 217 U. S. 196, 206-7.

Oregon R. R. & Navigation Co. v. Fairchild, 224 U. S. 510, 523.

GENERAL ORDER NUMBER FOURTEEN.

The District Court, pretermitting the merits, thought that the plaintiff carrier was compelled to file a formal application with the Georgia Commission for authority to stop the temporary switching service rendered the Warehouse Company. (R.,

56-7.) *The sole predicate of its decision was a point in procedure.*

In other words, and in substance, an interstate carrier must solemnly petition a State Commission for authority to obey applicable and controlling Federal laws. We respectfully dissent from that view.

(a) General Order No. 14 amends the Georgia Commission's Order No. 314, *which had to do only with charges.* (R., 34-5.) Properly construed, bearing in mind that this was but the amendment of another order, it has no application to a switching service on a private industrial siding.

This was obviously the construction placed upon General Order No. 14 by the Georgia Commission itself, as it had, contemporaneously in effect, separate rules for industrial sidings. (R., 35-6.)

(b) Such a tribunal as the Georgia Public Service Commission is a creature of statute, with no inherent powers and, if its acts are to be valid, must literally follow the powers actually vested in it.

Wichita Ry. & Lt. Co. v. Public Utilities Com., 43 S. C. R. 51, 55.

Gulf & Ship Island R. R. v. R. R. Commission 94 Miss. 124, 49 So. 118.

Section 2664 of the 1910 Georgia Code is Section 7 of the Act of August 22, 1907. It, together with Section 6, are set out in full in the Appendix, page 36 infra.

These sections do not empower the Georgia Commision to make *any general order* relative to industrial or spur tracks, but every such order must be

made only *after hearing in each particular case.* A reading of the statute impels this conclusion—the Georgia courts have never passed upon this question.

Said General Order 14 is therefore void under the Georgia laws because made without statutory authority.

(c) The original order of August 6, 1923, (R., 4) and the final order of August 31, 1923, (R., 23) neither refer to General Order 14, although a mere letter of the Commission did. (R., 5.) General Order 14 was apparently an afterthought and makeweight. The final order reads: "Upon consideration of the facts and the law in this case. . . ." (R., 23.) *No reference is made to General Order No. 14.* Obviously, the Commission did not predicate its action thereon. *Its conclusion was on the merits not procedure.*

(d) The District Court merely denied the interlocutory injunction prayed "without prejudice," (R., 57) so that there could be a hearing before the Georgia Commission. *There has already been a full and complete hearing.*

True the Railroad filed no petition, but in obedience to a rule *nisi* it filed an elaborate answer. (R., 33-38.) There was a complete hearing. *The Georgia Commission did not decide the case on a procedural point, but "upon consideration of the facts and the law in this case."* (R., 23.)

A full and complete hearing was had. The District Court suggests that we *go back to the Georgia Commission* and, instead of filing an answer, file a petition—the contents being the same—introduce

the same evidence and make the same arguments, although the Commission had already decided the case "upon consideration of the facts and the law. . . ." (R., 23.)

Assuming General Order No. 14 to be valid and applicable, the only requirement would be that the carrier file a petition. *The carrier did file an answer.* Evidence was introduced, a brief filed and a decision on the merits had. *The spirit and substance of General Order 14 has been complied with.* This Court looks through forms to substance. "The question is not one of form, but of actuality." *Southern Ry. v. Prescott*, 240 U. S. 632, 639. Again: ". . . this court must determine the effect of the thing actually done." *First Nat'l Bank v. Adams*, 258 U. S. 362, 365 . Again: ". . . we must regard matters of substance and not mere form." *Weiss v. Stearn*, 44 S. C. R., 490, 492.

Actually there has been a hearing—there has been a decision on the merits, not practice. Must the carrier go back? *Cui bono?*

It is insisted that every requirement of Georgia procedure has been in substance followed.

(e) But was any hearing before the Georgia Commission necessary? We insist not, though the railroad company showed cause and participated in the hearing as a matter of courtesy. If the law applicable to the undisputed facts be as we maintain, why should there be any proceding before the Georgia Commission? It has no power to enforce Federal laws—it cannot grant immunity therefrom. We repeat that the District Court in substance said "Go back to the Georgia Commission and ask authority

to obey Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act and if that Commission does not give you that authority we hereby authorize you to appeal to this Court again."

The Federal laws are applicable and paramount and the District Court should have, we submit, enforced them and not required plaintiff to seek from a State Commission that over which it had no voice.

In conclusion, plaintiff is trying to do two things:

1. To remedy the discriminations and preferences that have grown up in three-quarters of a century of operation and to prevent such discriminations in the future.

To require all those industries which have been located on plaintiff's lines for years and years to abandon existing contracts and accept the present standard will require much time and labor, but plaintiff proposes to do it. However, it can now require, and is actually requiring, new industries to conform to the present standard. No industry has located on plaintiff's lines since March 1, 1920, which has not signed this standard contract. Nearly two hundred have so signed. The industries immediately adjacent to and in the neighborhood of the Warehouse Company have so signed.

The class to which the National Bonded Warehouse, Inc., belongs—those similarly circumstanced —are those which have located on plaintiff's rails since March 1, 1920. *All of these have been and are being treated exactly alike. All the railroad is asking of the Warehouse Company is to do what nearly two hundred others have done.*

As soon as possible plaintiff will put all industries,

those located before as well as after March 1, 1920, on exactly the same basis, but it cannot do all this immediately or simultaneously. It will take time, trouble, and, doubtless, much litigation. Industries, as the rest of us, are prone to cling to special privileges.

The railroad is not here insisting that its standard contract is perfect. It does not ask the Court to approve it. That question is not here involved. What it asks is that the Court approve its policy of standardization, of uniformity of treatment, of making discriminations and preferences impossible. When that is done it will be prepared to defend each and every provision of its uniform contract, which it belives to be reasonable, when any one institutes a proceeding appropriate to that end.

It is no easy matter to correct abuses, to take away special privileges, to treat all alike. This the railroad is earnestly trying to do. This the Georgia Commission would make impossible; hence the request that its order be invalidated.

2. To require industries to bear a fair proportion of the special service of the construction, maintenance and operation of industrial sidings. Instead of making special rates for such switching, plaintiff, as do most railroads, prefers to have the industry bear a fair proportion of the actual cost of such service and assume a fair proportion of the possible loss from fire and accident.

The Georgia Commission has ordered plaintiff to render this special service *without any contract at all*—without any compensation. It has adequate public team tracks within two blocks, yet it is ordered

to furnish the land, repair a track it built, maintain and operate it, at its great expense, for the sole benefit of the Warehouse Company, without any compensation. Such an order takes its property without due process of law and directly burdens interstate commerce.

It is respectfully submitted that the order of the Georgia Commission is void and its enforcement should have been enjoined by the District Court.

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Of Counsel.

APPENDIX.

GEORGIA LAWS, 1907, PART I., TITLE 6, SECTIONS 6 AND 7, PAGES 75, 76, BEING SECTIONS 2663 AND 2664, RESPECTIVELY, OF THE 1910 GEORGIA CODE.

Section 6. Be it further enacted by the authority aforesaid, That the Railroad Commission of Georgia shall have and exercise all the power and authority heretofore conferred upon it by law and shall have the general supervision of all common carriers, railroads, express corporations or companies, street railroads, railroad corporations or companies, dock or wharfage corporations or companies, terminal or terminal station corporations or companies, telephone and telegraph corporations or companies within this State, gas or electric light and power companies within this State, and while it may hear complaints, yet the commission is authorized to perform the duties imposed upon it of its own initiative and to require all common carriers and other public service companies under their supervision to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases, and to require such publication by common carriers in newspapers of towns through which their lines extend of their schedules as may be reasonable and which the public convenience demands. Said commission is hereby given authority to examine into the affairs of said companies and corporations and to keep informed as to their general condition, their capitalization, their franchises, and the manner in

which their lines, owned, leased or controlled, are managed, conducted, and operated not only with respect to the adequacy, security and accommodation afforded by their service to the public and their employees, but also with reference to their compliance with all provisions of law, orders of the commission and charter requirements. Said commission shall have the power and authority whenever it deems advisable, to prescribe, establish and order a uniform system of accounts to be used by railroads and other corporations over which it has jurisdiction hereunder; the same to be as far as practicable in conformity with the system of accounts prescribed by the Interstate Commerce Commission; to examine all books, contracts, records and documents of any person or corporation subject to their supervision, and compel the production thereof. Said commission shall have the power through any one or more of its members, at its direction, to make a personal visitation to the offices and places of business of said companies for the purpose of examination, and such commissioner or commissioners shall have full power and authority to examine the agents and employees of said companies under oath, or otherwise, in order to procure information deemed by the commissioners necessary to their work or of value to the public. Provided, that nothing in this Act shall be so construed as to repeal or abrogate any existing law or rule of the Railroad Commission as to notice or hearings to persons, railroads or other corporations interested in their rates, orders, rules or regulations issued by said commission before the same are issued, nor to repeal the law of

this State as to notice by publication of a change in rates as provided in the Act approved October 14, 1879, or any Act amendatory thereof.

Section 7. Be it further enacted, That the Railroad Commission shall have authority to ascertain the cost of construction and the present value of properties in Georgia owned by said corporations or companies, and to that end may employ necessary experts. Said commission shall have authority to prescribe rules with reference to spur tracks and sidetracks, with reference to their use and construction, removal or change, with full power to compel service to be furnished to manufacturing plants, warehouses and similar places of business along the line of railroads where practicable and in the judgment of the commission the business is sufficient to justify and on such terms and conditions as the commission may prescribe. It shall have power and authority to order and compel the operation of sufficient and proper passenger service when in its judgment inefficient or insufficient service is being rendered the public or any community. It shall have power and authority when in its judgment practicable and to the interest of the public to order and compel the making and operation of physical connection between lines of railroads crossing or intersecting each other. It shall have authority to fix penalties for neglect on the part of railroad companies to adjust overcharges and losses or failure to decline to do so, if deemed unjust, in a reasonable time. It shall have power and authority to prescribe rules and penalties covering and requiring the prompt receipt carriage and delivery of freight, the prompt

furnishing of cars to shippers desiring to ship freight, and shall also be authorized to prescribe rules and penalties for the transfer of cars through yards by connecting roads. Said commission shall have power and authority to order the erection of depots and stations where it deems the same necessary, and to order the appointment and service thereat of depot or station agents. The commission shall also have the power and authority to regulate schedules and compel connections at junction points of competing lines.

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No. 209.

In The
Supreme Court of the United States

OCTOBER TERM, 1924.

WESTERN & ATLANTIC RAILROAD,
Appellant,
Versus
GEORGIA PUBLIC SERVICE COMMISSION,
ET AL., *Appellees.*

On Appeal from the District Court of the United States for the Northern District of Georgia.

BRIEF FOR THE GEORGIA PUBLIC SERVICE COMMISSION.

W. E. WATKINS,
Counsel for Appellees.

October 1st, 1924.

TOWNLEY PRINTING COMPANY, INC., - ATLANTA

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In The
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No. 209.

BRIEF FOR THE GEORGIA PUBLIC SERVICE COMMISSION.

Brief of Argument: Prior to the year 1915, the siding involved was built by the Railroad to serve a brick yard beyond the property now occupied by the National Bonded Warehouse. (R, 39.)

Prior to 1916, the building occupied by the Warehouse Company was erected alongside the siding between the brick yard site and the switch, and service rendered the building and property continuously until August 15, 1923. (R, 51.)

In 1916 Mr. Monroe purchased the property and conducted a business under the corporate name of Dixie Paper and Box Company, using the building and siding. (R, 53.)

In May, 1922, Mr. Monroe incorporated under the name of National Bonded Warehouse, using the same property but enlarging the building and increasing the lines of business. (R, 51-4.) The Dixie Paper and Box Company is still doing business on the same property and in the same building as before. (R, 54.)

The Dixie Paper and Box Company is owned by Mr. Monroe, and the National Bonded Warehouse is owned, with the exception of one share, by the same person, Mr. Monroe. (R, 54.) The industry is the same as it has been all the time during the ownership of the property by Monroe, except enlarged. (R, 54.)

After incorporation as National Bonded Warehouse, with a view of changing the grade of the track, the question of changing the grade of the track was taken up by the Warehouse Company with the Railroad Company in 1922. A contract was submitted covering the cost of changing the grade but not signed. Again in 1923, the Warehouse Company desiring an entirely different change in grade of the track approached the Railroad. Another contract was submitted, but not signed, the parties disagreeing on the terms. (R, 52.)

August 4, 1923, the Railroad issued an ultimatum to the Warehouse to sign the contract as written or service would be discontinued on August the 15th. (R, 4.)

This letter was presented to the Georgia Public Service Commission, and its chairman, under date of August 6th,

1923, directed the Railroad not to discontinue service without permission of the Commission. (R, 4.)

August 9th, 1923, the Railroad, instead of asking permission of the Commission undertook to justify its previous notice to the Warehouse of discontinuing service on the 15th of the month. (R, 5.)

August 10th the chairman of the Commission in reply to the letter of August the 9th, called the Railroad's attention to the Commission's General Order No. 14. (R, 5.)

August 13th, 1923, the Railroad in answer to the chairman's letter of the 10th, calling their attention to the Commission's General Order No. 14, denied its applicability to the case involved. (R, 6.)

August 14th, the chairman of the Commission again directed the Railroad not to discontinue service, without first applying to and gaining the permission of the Commission. (R, 6.)

August 17th, the Commission, on advise that service had been discontinued, ordered the Railroad Company to show cause why service should not be restored. (R, 7.)

In answer to the rule the Railroad Company contended:

First, that the provisions of the Commission's General Order No. 14 were inapplicable. (R, 36.)

Second, that compliance with the order to restore service would violate Section 2 and 3 of the Interstate Commerce Act, and Section 1 of the Elkins Act. (R, 38.)

The order of the Commission was general in its terms and necessarily covered the question raised by the rule and

answer in the order ordinarily followed which was first that the terms of General Order No. 14 were applicable and had been violated.

AUTHORITY OF THE COMMISSION.

The object and purpose of the Georgia law in creating the Georgia Public Service Commission was to supervise the public utilities and secure to the citizens, continuous and uninterrupted service. In order to insure this service rules were necessary and were promulgated. To this end the Commission's General Order No. 14, was passed and published, which is as follows:

Office of the Railroad Commission of Georgia.

Atlanta, December 23, 1909.
File No. 9162.

Circular No. 314 is hereby amended by substituting thereafter General Order No. 14, which becomes effective this day, as follows:

General Order No. 14.

All rates now in effect or which may hereafter become effective, which are not higher than the maximum rates prescribed by this Commission, whether such rates are the result of voluntary action upon the part of any company, corporation or person subject to the jurisdiction of this Commission, or otherwise, are hereby established as the rates of the Railroad Commission of Georgia, and no such rates shall be discontinued nor raised without the consent of the Railroad Commission first being obtained, but all such rates shall continue in force without hindrance, the same as other rates prescribed by the Commission. And any and all facil-

ities, privileges or service, now in effect or practiced, or hereafter made effective, extended, or practiced, which give, grant, extend or allow patrons, shippers or other persons transacting business with said companies, corporations or other persons as much or more of the privileges, facilities or service to which they are entitled by law or by any rule, regulation or order of this Commission, whether such privileges, facilities or service are given, granted, extended or allowed as the result of voluntary action upon the part of such companies, corporations or persons, or otherwise are hereby established as the requirements of the Railroad Commission of Georgia, and no such privilege, facilities or service shall be discontinued without the consent of the Railroad Commission first being obtained, but all such privileges, facilities or service shall be given, granted, extended or allowed without hindrance, the same as other requirements of this Commission; *provided* that nothing herein contained shall operate as repealing in any way the provisions of Passenger Rule No. 7.

By order of the Board:

CAMPBELL WALLACE,
Secretary.

H. W. HILL,
Chairman.

Section 2664 of the Georgia Code 1910, clothes the Georgia Public Service Commission with power and authority to compel service to be furnished to manufacturing plants, warehouses and similar places of business along the line of railroad. (This section fully set forth in appendix.)

This law was passed in the year 1907, two years prior to General Order No. 14.

> Construed—Railroad Commission of Georgia et al versus Louisville & Nashville Railroad Company, 148 Ga. 442.

If the Commission acted under statutory authority in promulgating the order and the carrier violated its provisions, why should the carriers cause be heard and determined by the Commission until they come within the terms of the rules requiring the carrier to ask and gain permission before discontinuing a service? Regular rules of procedure are prescribed by the Commission, and in this instance it is incumbent upon the carrier to file a regular petition asking for the right to discontinue the service before their right to be heard in the court ripens.

For this reason the Commission moved to dismiss the petition on the ground that the complaint set forth no cause of action.

When the statute gives the Commission jurisdiction of the subject, its orders are binding unless shown to have been unreasonable and to have violated some statutory or constitutional right.

> Railroad Commission of Georgia et al versus L. & N. Railroad Co., 140 Ga., 817.

Wadley Southern Rwy. Co. versus State of Georgia, 235 U. S. 651-8.

In Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, referring to the Interstate Commerce Commission, it was held: "In determining whether an order of the Interstate Commerce Commission shall be suspended or set aside, power to make—and not the wisdom of—the order is the test, and this court must consider all relevant questions of constitutional power or right, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to be made, and also whether even if in form it is within such delegated authority it is not so in substance because so arbitrary and unreasonable as to render it invalid."

This rule tends to insure regular, orderly, dignified procedure in discontinuing services already installed, and is not unreasonable.

A railroad, having once established a public facility like a spur track, can not at its own pleasure abandon it so long as there is any reasonable necessity for its continued operation.

Rex vs. Severn & W. Rwy. Co., 2 Barn & Ald. 646, 21 Revised Rep. 433, 7 Eng. Rul. Cas. 445.

People vs. Albany and Vermont Railroad Co., 37 Barb. 22.

Chicago & A. R. Co. vs. Suffern, 129 Ill., 274, 21 N. E., 824.

The sidetrack in question is on the right of way of the Railroad. (Exhibit No. 1, P. R.)

The Supreme Court of Georgia construing Section 2664 Georgia Code, 1910, in the case of Railroad Commission of Georgia et al., vs. Louisville & Nashville Railroad Company, 148 Ga., 442, decided that a side track built on the right-of-way of a railroad, is, as a matter of law, a public track. This case was decided on demurrer and therefore free from all questions except the question of law presented.

A spur track, although serving but one industry, is a public track. The number using shows the extent but not the nature.

Railroad Commission of Georgia et al vs. L. & N. Railroad Co., 148 Ga., 442.

Hairston vs. Danville & Western Rwy. Co., 208 U. S. 608-9.

Union Lime Co. vs. Chicago & N. W. Rwy. Co., 233 U. S. 211.

RULES OF THE RAILROAD, HOW FAR BINDING.

Rules and regulations prescribed by a State Railroad Commission supersede any rules and regulations prescribed by the carriers which are in conflict therewith.

10 C. J. Page 65, Sec. 41.

The fact that railroads, like common carriers at common law, could make reasonable rules and regulations in regard to their own operation, in the absence of any statute or valid rule of a railroad commission, does not negative the power of the State, directly by Legislative Act, or through a railroad commission, duly authorized, to regulate such carriers.

Railroad Commission of Georgia et al., vs. L. & N. Rwy. Co., 140 Ga. 817.

If the compensation for the services rendered in switching the cars, back and forth, is inadequate, the remedy is by regular petition to the Commission asking for an increase in the charges made therefor.

SECTION 2, INTERSTATE COMMERCE ACT.

The principal purpose of Section 2 of the Interstate Commerce Act was to prevent unjust discrimination in RATES between shippers.

Interstate Commerce Commission vs. Ala. Midland Railway Co., 168 U. S. 166.

Wright vs. United States, 167 U. S. 512.

Seaboard Air Line Railway Co. vs. United States, 254 U. S. 61.

The word REBATE as found in the Interstate Commerce Act, is used in an offensive sense, and refers only to such discount, deduction or drawback as is the bases of a discrimination in favor of a particular person and against other person in a like situation, and destroys that equality of treatment as to RATES to which the public is entitled and which it is the purpose of the law to enforce.

10 C. J. 447.

American Sugar Refining Co. vs. Delaware etc. R. R. Co., 207 Fed. 733.

Section 2 does not relate to preferences, as between localities, or to preferences in facilities furnished, except so far as the facilities furnish or denied make the RATE a discriminating one.

United States vs. Delaware etc. R. R. Co., 40 Fed. 101.

A railroad can not raise the issue of discrimination between localities.

Interstate Commerce Commission vs. Chicago & Rock Island and Pacific Railway Co. 218 U. S. 88, 108.

"That the companies may complain of the reduction made by the Commission so far as it affects their revenues, is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his own."

Clark vs. Kansas City, 176 U. S. 114, 118.

Smiley vs. Kansas 196 U. S. 447.

"We have also said that the primary jurisdiction is with the Commission, the power of the courts being that of review, to questions of constitutional power and all pertinent questions, as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made." Citing Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S. 452, 478. Interstate Commerce Commission vs. Chicago & Rock Island & Pacific Rwy. Co. 218 U. S. 110.

"The question of undue and unreasonable preferences or advantages to any locality forbidden by the Interstate Commerce Act of 1887 (24 Stat. at L. 379, Chap. 104 U. S. Comp. Stats. Suff. 1911, p. 1284) Section 3, arose from the operation of an intrastate rate, or whether any locality was thereby subjected to an undue or unreasonable prejudice or disadvantage, would be primarily for investigation of the Interstate Commerce Commission and not for the courts, assuming that such a case is within the statute."

George T. Simpson et al. vs. Davis C. Sheppard, 230 U. S. 352.

In conclusion it will be observed that this is not an attempt to compel a railroad company to construct a side track or to spend any money for its upkeep but it is simply an effort to compel observance of a police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment. The track is already built, and on the hearing all questions of repairs were eliminated and the bald question of the right of the Commission to compel a continuance of service in operation until permission is granted by the Commission to discontinue the serv-

ice. (R, 40.) A special hearing might be necessary in order to compel the building of a new track, but this regulation is not directed to the track, but to the service thereon.

> "The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizens, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government * * * *." 6 R. C. L. 182 et. seq.

It is respectfully submitted, that the regulation covered by General Order No. 14, is reasonable, is a police regulation, a regulation authorized by the Georgia law and should be upheld. Orderly procedure in discontinuing services already established tends to promote public morals, public safety, and public convenience.

W. E. WATKINS,
Counsel for Appellees.

APPENDIX.

GEORGIA LAWS, 1907; Part 1., TITLE 6, SECTION 7, Page 76, BEING SECTION 2664, OF THE 1910 GEORGIA CODE.

Section 7. Be it further enacted, That the Railroad Commission shall have authority to ascertain the cost of construction and the present value of properties in Georgia owned by said corporations or companies, and to that end may employ necessary experts. Said commission shall have authority to prescribe rules with reference to spur tracks and sidetracks, with reference to their use and construction, removal or change, with full power to compel service to be furnished to manufacturing plants, warehouses and similar places of business along the line of railroads where practicable and in the judgment of the commission the business is sufficient to justify and on such terms and conditions as the commission may prescribe. It shall have power and authority to order and compel the operation of sufficient and proper passenger service when in its judgment inefficient or insufficient service is being rendered the public or any community. It shall have power and authority when in its judgment practicable and to the interest of the public to order and compel the making and operation of physical connection between lines of railroads crossing or intersecting each other. It shall have authority to fix penalties for neglect on the part of railroad companies to adjust overcharges and losses or failure to decline to do so, if deemed unjust, in a reasonable time. It shall have power and authority to prescribe rules and penalties covering and requiring the prompt receipt carriage and delivery of freight, the prompt furnishing of cars to shippers desiring to ship freight, and shall also be authority to prescribe rules and penalties for the transfer of cars through yards by connecting roads. Said commission shall have power and authority to order the erection of depots and stations where it deems the same necessary, and to order the appointment and service thereat of depot or station agents. The commission shall also have the power and authority to regulate schedules and compel connections at junction points of competing lines.

END

OF

CASE

Counsel for Parties.

WESTERN & ATLANTIC RAILROAD *v.* GEORGIA PUBLIC SERVICE COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 209. Argued January 20, 1925.—Decided April 13, 1925.

1. A rule of a state public service commission that railroad switching service to which shippers are entitled by law or by rule of the commission, whether or not granted voluntarily by the railroad, shall not be discontinued without the consent of the commission after notice and hearing, is reasonable and within the police power of the State. P. 496.
2. An order of a state commission requiring a railroad to continue to furnish switching service to a shipper on an established industrial siding does not deprive the railroad of property without due process, in violation of the Fourteenth Amendment, merely because the switching, separately considered, may not be profitable to the railroad, or may even involve a loss. P. 496.
3. Under § 402 of the Transportation Act, 1920, the power to order establishment or abandonment of such side tracks, though employed largely for interstate commerce, is not with the Interstate Commerce Commission but with the States. P. 497.
4. A bill to enjoin a state commission from enforcing an order requiring the plaintiff railroad to maintain service on an industrial switch track, will not lie upon the ground that the service creates undue discrimination between interstate shippers in cost of transportation, since this is a question which must be presented to the Interstate Commerce Commission. P. 497.

Affirmed.

APPEAL from a decree of the District Court refusing a temporary injunction in a suit to restrain the appellee commission from enforcing an order requiring the appellant railroad to maintain service on an industrial side track.

Mr. Fitzgerald Hall, with whom *Messrs. H. C. Peeples, Frank Slemons*, and *William Waller* were on the brief for the appellant.

Mr. W. E. Watkins, for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The Western & Atlantic Railroad Company, an interstate common carrier, filed this bill in the District Court of the United States for the Northern District of Georgia against the Georgia Public Service Commission and its members, to enjoin the enforcement of an order of the Commission requiring the railroad to furnish switching service on an industrial siding to the National Bonded Warehouse, Inc., of Atlanta, Georgia.

In accordance with the limitations of § 266 of the Judicial Code, an application was made for a temporary injunction to a court consisting of a Circuit and two District Judges. The application was denied and this appeal was taken.

The industrial siding in question diverges from the main line of the Railroad Company, and was built many years ago for the convenience of industries then located on it. At the present time J. K. Shippey and the National Bonded Warehouse are the only industries served by it. The siding is all upon the right of way of the Railroad Company.

On August 2, 1923, the Railroad Company notified the Warehouse Company, that unless it signed a standard form of contract in respect to the sidetrack, its use and maintenance, which had been submitted to it, the service would be discontinued after August 15th. The Warehouse Company made complaint to the Public Service Commission. The Commission advised the Railroad Company that no application from the Company had been made to the Commission for such authority, which, under its Rule 14, was necessary before the service could be discontinued. However, on August 28th a full hearing was held by the Commission with the parties present, and as a result of such hearing it was ordered that, effective

immediately on receipt of the order, the Railroad Company should restore the service. Thereupon this bill was filed.

The bill avers that the Warehouse Company's premises are two city blocks, or 1600 feet, from the Railroad's public team tracks, which are adequate in size and construction conveniently and properly to handle all the public business, including that of the Warehouse Company; and that since the discontinuance of switching service on August 15th, conformably to the notice given, the Railroad has been ready to serve that industry on public team tracks; and that industrial sidings like the one in question have been put in without any care to avoid undue discrimination between interstate shippers in cost of transportation. It says that of the business done over the side track 85 per cent. is interstate. The Railroad Company therefore avers that if it does not continue the service as required by the order, it will be subject to penalty under the Georgia state law, and that if it obeys the order it will be guilty of undue discrimination under the interstate commerce law, and so will be subject to a heavy penalty in the federal jurisdiction.

The bill further alleges that the side track is out of repair and that in order to put it in proper condition it will require an expenditure of $440, that the receipts from the switching are but a small part of the cost of it and that enforced compliance with the order will thus deprive the Company of its property without due process of law.

The order made by the Commission was based on its General Order 14, promulgated December 23, 1909, which provided that any and all facilities and privileges enjoyed by shippers to which they were entitled by law or any rule of the Commission, whether granted by voluntary action on behalf of the railroad companies or otherwise, should not be discontinued without the consent of the Railroad Commission.

The three-judge court refused the application, on the ground that Rule 14 had not been complied with. Rule 14 is a reasonable rule and the Commission was fully justified in refusing to sanction a discontinuance of service until a petition had been filed with the Commission and a showing made. The doubt which arises in our minds is whether the Public Service Commission, by its consent to a full hearing of the issue without a formal petition and an order based on the merits, did not waive the defect of a petition. The action of the Company in discontinuing the service without a petition was arbitrary and defiant, but the subsequent action of the Commission seems to have condoned the fault in such a way as to prevent our making it a reason for not looking farther into the issues now raised by the Company in its bill.

It is said that the requirement of the continuance of the service deprived the Company of its property without due process of law, in violation of the Fourteenth Amendment, because the service rendered by the sidetrack was much greater in out-of-pocket cost than the compensation. This can not be sustained. The service has been rendered for years. It was a voluntary arrangement, and under its statutory powers (§ 2664, Georgia Code, 1910) was made irrevocable by the Public Service Commission under Rule 14, except by consent of the Commission. The spur track was for a public purpose. *Union Lime Co.* v. *C. & N. W. Ry. Co.*, 233 U. S. 211. The requirement that such a service should not be discontinued without notice and hearing was clearly within the police power of the State. *Chicago & Northwestern R. R. Co.* v. *Ochs*, 249 U. S. 416; *Lake Erie & Western R. R. Co.* v. *Cameron*, 249 U. S. 422; *Railroad Commission* v. *L. & N. R. R. Co.*, 148 Ga. 442. Even if the cost of the switching is more than what is received for it, we can not determine on any showing made by the Company that the switching does not work a benefit

in the increased business that the Company gets, or may get, by reason of the added facilities furnished by the switching. The switch is a small part of the whole railway, and the mere fact that the switching may not be profitable by itself can not be held to be a confiscation of property, even if it involves a loss. See *Fort Smith Light & Traction Company* v. *Bourland*, 267 U. S. 330.

It seems to be the contention of the Company that, since 85 per cent. of the business done on the side track is interstate commerce, the power to order its establishment or abandonment is vested in the Interstate Commerce Commission, and that the state commission is without authority in the premises. Such a claim is in the teeth of the Transportation Act of 1920, 41 Stat. 456, c. 91, § 402, par. 22, which provides that the authority of the commission conferred by § 402 over the extension or abandonment of interstate railway lines shall not extend to the construction of spur industrial or side tracks. See *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 345.

The question whether the continuance of the service on this industrial track violates the Interstate Commerce Act as unduly discriminatory, is one that involves issues not primarily for the courts, but is for the Interstate Commerce Commission. It requires a consideration by experts of the benefit of the use of such a siding as compared with that of other sidings, in connection with the rates in interstate commerce, to determine whether there is undue discrimination between shippers. The Railroad Company is therefore in no position to appeal to the courts on this ground until it has invoked the investigation and decision of the Interstate Commerce Commission upon the concrete facts in a proper manner. See *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, and the cases cited on page 295. If

and when the Commission shall have made such an investigation and have found the existence of undue discrimination, its order may well not be a specific direction against a continuance of service on a particular siding, but an order upon the Company to remove the undue discrimination between interstate shippers, giving discretion to the Company to adopt a satisfactory method of meeting the requirement. Compare *Houston & Texas Railway* v. *United States*, 234 U. S. 342, 360; *American Ry. Express* v. *Caldwell*, 244 U. S. 617, 624. In any event, relief can not be had by this bill, on the ground of undue discrimination, at the present stage of the controversy.

Affirmed.